SUBMISSION

The Exposure Draft Bill, Draft ACCC-CDPP MOU and Discussion Paper introducing criminal penalties for serious cartel conduct in Australia

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1. ISSUES AND CONCERNS

The Exposure Draft Materials released by the Government for public consultation are welcome but raise numerous issues and possible concerns.

We have discussed the main issues and concerns in a recent paper, “Criminalising Cartel Conduct: Issues of Law and Policy” (Issues Paper), presented at the University of Sydney on 21 February 2008 and at the University of Melbourne on 25 February. A copy of a revised version of that paper is attached (Attachment 1). We have also attached a copy of Justice Heerey’s commentary on the paper at the University of Melbourne on 25 February 2008 (Attachment 2).

The more significant issues and possible concerns discussed in our Issues Paper are:

- the absence of an explicit coherent framework for differentiating criminal prohibitions from civil penalty prohibitions – see Part 3;
- the novelty and breadth of the new civil penalty prohibitions – see Part 5;
- the retention of the existing per se prohibition against exclusionary provisions – see Part 5;
- the problems likely to arise if dishonesty is an element of the new cartel offences and the absence of any cogent justification for having any such element – see Part 6;
- the complexity of the fault elements of the new cartel offences – see Part 7;
- the basis on which criminal liability is to be imposed on individual persons, especially the imposition of vicarious criminal responsibility – see Part 8;
- the basis on which criminal liability is to be imposed on corporate persons and in particular the absence of any requirement of corporate fault (as distinct from fault merely on the part of an employee or agent) – see Part 9;
- the lack of a joint venture defence to the new cartel offences and the removal of existing exemptions under s 45(6), s 45A(4) and other provisions – see Part 10;
- the limited scope of and limited guidance provided by the Draft ACCC-CDPP MOU – see Part 11;
- the uncertainty concerning the availability of existing powers for investigation of the new cartel offences – see Part 12;
the question of whether or not telecommunications interception powers should be available for investigation of the new cartel offences - see Part 12;

the uncertainty concerning the procedures that will apply in criminal investigations and how parallel criminal and civil investigations will be handled – Part 12;

the differences between the CDPP’s approach to and criteria for immunity and the approach and criteria applied by the ACCC under the existing ACCC immunity policy, and the apparent unworkability of the co-operative arrangements set out in the Draft ACCC-CDPP MOU – see Part 13;

the substantial limits placed on the capacity of respondents and third parties to obtain access to information and documents from the ACCC by virtue of the “protected cartel information” scheme – see Part 14;

the fact that the new cartel offences will not be tried exclusively in the Federal Court – see Part 15;

the maximum penalties for individual and corporate offenders which are open to question – see Part 17;

the need for guidelines, including worked examples, to clarify and explain a range of matters.

Our recommendations are set out below.
2. RECOMMENDATIONS

2.1 Differentiating between criminal and civil prohibitions

- The concepts of dishonesty, secrecy or fraud are incapable of adequately distinguishing between criminal and civil prohibitions in this context – see Issues Paper, Part 3.2.

- The approach to be taken by the government should recognise explicitly that the task of differentiating between criminal and civil prohibitions cannot be addressed cogently in this context by focussing on a single consideration (eg dishonesty), but depends on many factors. Those factors are specified in the Issues Paper, Part 3.3.1.

- If, as we recommend (see Issues Paper, Part 6), the element of an intention dishonestly to obtain a benefit is removed from the definition of the cartel offences, it is possible to clearly differentiate between those offences and civil penalty prohibitions by the following means:
  
  - requiring the prosecution to establish criminal liability by proof beyond a reasonable doubt – see Issues Paper, Part 3.3.1;
  
  - tightening up the fault elements for the new cartel offences and making the fault elements explicit in the definition of the offences - see Issues Paper, Part 7;
  
  - avoiding the strictness of vicarious criminal responsibility by making a defence of reasonable precautions available to individual and corporate defendants who are charged with a cartel offence – see Issues Paper, Parts 8 and 9;
  
  - revising the scope and definition of exemptions and defences, at least to the extent of making the new cartel offences subject to: (a) a joint venture defence corresponding to that now provided under ss 76C and 76D of the Trade Practices Act 1974 (Cth) (TPA); and (b) an exemption corresponding to the exclusive dealing exemption under s 45(6) of the TPA – see Issues Paper, Part 10; and

  - expanding and enhancing the Draft ACCC-CDPP MOU – see Issues Paper, Part 11.

2.2 The new regime of prohibitions

- The proposed new regime of prohibitions is complex and does not reflect the following desiderata: (a) the desirability of defining criminal and civil liability separately; (b) the need to define criminal liability narrowly; (c) the need to rectify known problems arising under the existing civil penalty prohibitions; and (d) the need to define new civil penalty prohibitions in a manner that covers the types of conduct that warrant per se prohibition without also catching conduct that is innocuous or not plainly anti-competitive – see Issues Paper, Parts 3, 4 and 5.
There are four main options for dealing with these issues:

- **Option 1:**
  1. retain the existing civil per se prohibitions under s 45 (s45A/s4D) but with some improvements (see Recommendations under 2.3 and 2.5 below); and
  2. make the breach of the same prohibitions also a criminal offence with additional fault elements adapted from the *Criminal Code* (see Recommendation under 2.5 below).

- **Option 2:**
  1. repeal the existing civil per se prohibitions under s 45 (s45A/s4D);
  2. create a new set of civil per se prohibitions along the lines proposed in the Exposure Draft Bill but with more narrowly defined physical elements (see Recommendations under 2.3 below); and
  3. make the breach of the same prohibitions also a criminal offence with additional fault elements adapted from the *Criminal Code* (see Recommendation under 2.5 below).

- **Option 3:**
  1. retain the existing civil per se prohibitions under s 45 (s45A/s4D) but with some improvements (see Recommendations under 2.3 and 2.5 below); and
  2. create new cartel offences with much more narrowly defined physical elements (see Recommendations under 2.3 below) and additional fault elements adapted from the *Criminal Code*.

- **Option 4:**
  1. repeal the existing civil per se prohibitions under s 45 (s45A/s4D);
  2. create a new set of civil per se prohibitions along the lines proposed in the Exposure Draft Bill but with more narrowly defined physical elements (see Recommendations under 2.3 below); and
  3. create new cartel offences with even more narrowly defined physical elements than under the new civil per prohibitions (see Recommendations under 2.3
Any of these options would represent a significant advance on the current proposal. Subject to the recommendations in 2.3 below regarding the physical elements of the new cartel offences and new civil penalty prohibitions, Option 4 is the most attractive in terms of establishing a regime that achieves the desiderata identified above.

2.3 Physical elements of the new cartel offences and new civil penalty provisions

(a) Contract, arrangement or understanding

- The recent recommendation of the ACCC to the Government that the definition of a “contract, arrangement or understanding” be amended to facilitate civil penalty actions against price fixing, if adopted, should be limited to that context and not extended to the new cartel offences. See Issues Paper, Part 5.2.

(b) Existing civil penalty prohibition against exclusionary provisions

- The definition of an exclusionary provision in s 4D of the TPA is uncertain in scope and excessively broad. The existing civil penalty prohibition against exclusionary provisions should be repealed. See Issues Paper, Part 5.3.1A.

- If the existing civil penalty prohibition against exclusionary provisions is to be retained, it should be amended to restrict the persons or classes of persons to which a prohibited exclusionary provision relates, to a competitor or competitors, actual or potential, of one or more of the parties to the provision. See Issues Paper, Part 5.3.1A.

(c) New civil penalty prohibitions

- The new definition of price fixing under the Exposure Draft Bill is too broad in several respects. The definition should not extend to effect on pricing in downstream markets or to maximum price fixing. The meaning of “fixing, controlling or maintaining” should be clarified and narrowed. See Issues Paper, Part 5.3.1B. If the definition of price-fixing under s 45A is retained (adopting Option 1 or Option 3; see 2.2 above), the same recommendations apply to that definition.

- The new definition of output restriction under the Exposure Draft Bill should apply to restrictions on acquisition. See Issues Paper, Part 5.3.1C.

- The “effect” limb of the purpose/effect condition should not apply to the new definition of output restriction. See Issues Paper, Part 5.3.1D.
• There should be an exemption corresponding to that now provided by s 45(6) of the TPA. See Issues Paper, Part 5.3.1C.

• The “effect” limb of the purpose/effect condition should not apply to the new definition of market division. See Issues Paper, Part 5.3.1D.

• The concept of “allocation” in the new definition of market division under the Exposure Draft Bill is obscure and requires statutory clarification, particularly if the “effect” limb of the purpose/effect condition is retained. See Issues Paper, Part 5.3.1D.

• The new bid rigging definition should be amended to exclude situations where the “rigging” is consented to, as under s 188(6) of the Enterprise Act 2002 (UK). See Issues Paper, Part 5.3.1D.

(d) **New cartel offences**

• The physical elements of the new cartel offences should be defined separately from and more narrowly than the physical elements of the new civil penalty prohibitions. See Recommendation 2.2; Issues Paper, Part 5.3.1.

• Output restriction should be removed from the definition of cartel provision for the purposes of the new cartel offences. See Issues Paper, Part 5.3.1B.

• The recommendations under para (c) above relating to the definitions of price-fixing, market division and bid rigging apply also to those definitions for the purposes of the new cartel offences.

• The new cartel offences should apply only to those parties to a contract, arrangement or understanding who are in competition with each other. See Issues Paper, Part 5.3.2.

2.4 **“Intention dishonestly to obtain”**

• The element of an “intention dishonestly to obtain a benefit” in the definition of the new cartel offences in the exposure Draft Bill is bound to cause major practical difficulties that are likely to undermine the enforcement potential and impact of the new regime. It should therefore be removed. See Issues Paper, Part 6.2 and the observations of Justice Heerey in the commentary at Attachment 2.

• The proposed cartel offences are concerned with price fixing and other forms of interference with the competitive market process. They should not be confused with theft or fraud-related offences by corporate officers. The comparison with offences of dishonesty made in the Discussion Paper accompanying the Exposure Draft Bill is superficial, misleading and based on a serious category mistake. See Issues Paper, Part 6.3.1.
A requirement of dishonesty in a cartel offence is highly unusual. There is only one international precedent (the UK). The jury is still out on the questionable UK experiment. See Issues Paper, Part 6.3.2.

A statutory element of dishonesty is not required for deterrence, education or any other relevant purpose. See Issues Paper, Part 6.3.3.

2.5 Fault elements of the new cartel offences and new civil penalty prohibitions

The fault elements of the new cartel offences are too complex to be conveyed easily to juries – see Issues Paper, Part 7.2. A simpler approach would be to require a common intention to achieve one or more of the objects specified as effects in the definition of a cartel provision under s 44ZZRD(2) of the Exposure Draft Bill, plus awareness that the relevant circumstances required for liability are “more likely than not” or “highly likely” – see Issues Paper, Part 7.5.

All the fault elements of the new cartel offences should be stated explicitly – see Issues Paper, Part 7.5.

The ambiguity of the wording “purpose of a provision” should be avoided in the new and existing civil penalty prohibitions by requiring that two or more parties to the contract, arrangement or understanding acted with a common purpose to achieve the relevant prescribed effect. See Issues Paper, Part 7.3.

2.6 Individual criminal liability for the new cartel offences

Vicarious criminal responsibility should not be imposed on individual persons in relation to fault on the part of an employee or agent. A defence of reasonable precautions should be available. See Issues Paper, Part 8.3.

2.7 Corporate criminal liability for the new cartel offences

Vicarious criminal responsibility should not be imposed on corporate persons in relation to fault on the part of an employee or agent. A defence of corporate reasonable precautions should be available. See Issues Paper, Part 9.2.
2.8 Exemptions and defences

- The new cartel offences should be subject to a joint venture defence corresponding to that under ss 76C and 76D of the TPA. See Issues Paper, Part 10.2.

- The joint venture defence under s 44ZZRO of the Exposure Draft Bill should apply to incorporated joint ventures as well as to unincorporated joint ventures. See Issues Paper, Part 10.3.

- The exemptions that now apply under s 45A(4), s 45(5)(6) and (7) should apply to the new cartel offences and the new civil penalty prohibitions. See Issues Paper, Parts 10.4-10.6.

2.9 Enforcement policy

- The Draft MOU should set out in greater detail the considerations that will be relevant to the ACCC decision to carry out a criminal investigation of conduct. See Issues Paper, Part 11.3.

- The Government should reconsider the $1m threshold applicable to the ACCC decision to refer to the CDPP for prosecution with a view to adopting one of the three options identified in Issues Paper, Part 11.4.

- The Draft MOU should be amended to include culpability-related factors in the list of factors that the ACCC will consider in deciding whether to refer a matter to the CDPP for prosecution. See Issues Paper, Part 11.4.

- The Draft MOU should be amended to provide more information about the approach to be taken to concurrent criminal and civil proceedings and, in particular, the ramifications of the rules under proposed s 76B for evidence-gathering. See Issues Paper, Part 16.4.

- The Draft MOU should be expanded to include information regarding:
  - the approach to be taken to negotiations on penalties and s87B undertakings and the intersection between this and referral to the CDPP;
  - information sharing between the ACCC and CDPP;
  - actions to recover penalties or costs and expenses; and
  - the interrelationship between the new cartel offences and money laundering offences.

2.10 Powers of investigation

- Section 155(1) in Part XII and the definition of “evidential material” under Part XID of the TPA should be amended to refer to an “offence under ss 44ZZRF and 44ZZRG” of the Act, so as to make it clear that the powers conferred on the ACCC under those Parts are available in respect of the new cartel offences. Consequential amendments should be made to s 154G(1). See Issues Paper, Part 12.1.

- The question of the appropriateness of the proposed maximum jail term of 5 years should be considered separately from the question as to whether telephone interception powers under the Telecommunications (Interception and Access) Act 1979 should be available in respect of investigations under the new cartel offences. See Issues Paper, Part 12.2.

- The question as to whether telephone interception powers should be available for this purpose should not be resolved without careful consideration of, amongst other things:
  - the past and current investigatory practices of the ACCC in respect of cartel activity, the effectiveness of such practices and the extent to which they would be enhanced by telephone interception powers having regard, particularly, to the role played by informants in such investigations;
  - the experience of overseas regulators, particularly in the United States and Canada, in the use of telephone interception powers and of others, such as in the United Kingdom, that have had experience in criminal investigations without such powers.


- Section 155(7B) should be amended to clarify that legal professional privilege applies not only to the production of documents, but also to the furnishing of information and answering of questions pursuant to a s 155 notice. See Issues Paper, Part 12.4.2.

- A provision corresponding to s 155(7B) should be inserted into Part XID as to remove any doubt that the privilege applies also in relation to evidential material subject to a warrant under that Part. See Issues Paper, Part 12.4.2.
2.11 Immunity

- Insofar as it sets out the CDPP’s policy in respect of immunity, the *Prosecution Policy of the Commonwealth* should be amended to make it consistent with the ACCC’s Immunity Policy for Cartel Conduct (2005) in relation to both the timing at and conditions on which immunity from criminal proceedings will be granted by the CDPP. Further, the draft MOU should be amended to refer to this change in CDPP policy. See Issues Paper, Part 13.4.

- The Draft MOU should be amended to clarify the relationship between decisions relating to immunity and decisions relating to referral for prosecution and, in particular:
  - whether it is open to the ACCC to refer a matter for prosecution while at the same time making a recommendation in favour of immunity from criminal proceedings;
  - whether it is open to the CDPP to grant immunity from criminal proceedings after a matter has been referred to it for prosecution by the ACCC (and assuming the ACCC has made no recommendation on the matter either prior to or at the time of referral, as appears will be the case under the draft MOU).


- The Draft MOU should be expanded to provide guidance on the extent to which the CDPP will have access to and be able to use information provided to the ACCC by applicants for immunity in connection with their application. See Issues Paper, Part 13.5.

- The ACCC Immunity Policy should be amended to explain the procedures to apply in respect of applications for immunity from criminal proceedings and the role of the CDPP and interaction between the CDPP and the ACCC in relation to such applications. See Issues Paper, Part 13.6.

2.12 Access to information held by the ACCC

- The operation of the proposed provisions in ss 157, 157B-D creating the “protected cartel information scheme” should be examined in two years time to assess whether the various competing interests affected by the scheme have been adequately balanced and, in particular, whether further safeguards are required to protect the rights of persons facing allegations under the new regime of prohibitions. See Issues Paper, Part 14.4.

2.13 Jury trials

- The new cartel offences should be tried exclusively in the Federal Court. See Issues Paper, Part 15.2.
2.14 Maximum penalties

- The maximum individual fine for the new cartel offences should be at least $500,000, if not higher. See Issues Paper, Part 17.3.

- For the maximum pecuniary penalty applicable to the new civil penalty prohibitions and the existing civil penalty prohibitions under s 45, the formula applicable to calculating the value of the benefit derived from the cartel (as set out in proposed s 76(1A)(aa)(ii) and s 76(1A)(b)(ii)) should be the same. See Issues Paper, Part 17.5.

- Section 77A should be amended to make it clear that the prohibition on indemnification in that section extends to criminal fines and legal costs incurred in defending a criminal prosecution. See Issues Paper, Part 17.6.

2.15 Guidelines

- As soon as reasonably possible after the enactment of the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill, the ACCC should release guidelines, including worked examples, to clarify and explain a range of matters relating to the operation of the new regime, including:
  
  - Criminal investigations, covering the powers available to the ACCC, the circumstances in which different powers will be invoked, the procedures that will be employed, the limitations that will apply, and the management of parallel criminal and civil investigations (see Issues Paper, Part 12.8);
  
  - The provisions of the Exposure Draft Bill relating to “protected cartel information” (see Issues Paper, Part 14.5); and
  
  - Concurrent criminal and civil proceedings, including the legal rules and administrative arrangements that will be applied to guard against the risk of abuse (see Issues Paper, Part 16.4).

- In accordance with its usual practice, the ACCC should release draft guidelines on such matters for the purposes of consultation.
2.16 The consultation process and next steps

- Once Treasury has considered the submissions, a revised draft of the Exposure Draft Bill and draft ACCC-CDPP MOU should be released for a further brief (say, four week) period of consultation.

- Treasury should also release a further Discussion Paper that summarises the main points made in the submissions and Treasury’s reasons for adopting or rejecting those points, and explains the nature of and reasons for specific changes made to the Exposure Bill and draft ACCC-CDPP MOU.

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This is a revised version of a paper presented at the University of Sydney on 21 February 2008 and the University of Melbourne on 25 February 2008.

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### 18. CONCLUSION

### ANNEXURE
1. SUMMARY

The Exposure Draft Materials released by the Government for public consultation are welcome but raise numerous issues and possible concerns.

The more significant issues and possible concerns discussed in this paper are:

- the absence of an explicit coherent framework for differentiating criminal prohibitions from civil penalty prohibitions – see Part 3;
- the novelty and breadth of the new civil penalty prohibitions – see Part 5;
- the retention of the existing per se prohibition against exclusionary provisions – see Part 5;
- the problems likely to arise if dishonesty is an element of the new cartel offences and the absence of any cogent justification for having any such element – see Part 6;
- the complexity of the fault elements of the new cartel offences – see Part 7;
- the basis on which criminal liability is to be imposed on individual persons, especially the imposition of vicarious criminal responsibility – see Part 8;
- the basis on which criminal liability is to be imposed on corporate persons and in particular the absence of any requirement of corporate fault (as distinct from fault merely on the part of an employee or agent) – see Part 9;
- the lack of a joint venture defence to the new cartel offences and the removal of existing exemptions under s 45(6), s 45A(4) and other provisions – see Part 10;
- the limited scope of and limited guidance provided by the Draft ACCC-CDPP MOU – see Part 11;
- the uncertainty concerning the availability of existing powers for investigation of the new cartel offences – see Part 12;
- the question of whether or not telecommunications interception powers should be available for investigation of the new cartel offences; see Part 12;
- the uncertainty concerning the procedures that will apply in criminal investigations and how parallel criminal and civil investigations will be handled – Part 12;
the differences between the CDPP’s approach to and criteria for immunity and the approach and criteria applied by the ACCC under the existing ACCC immunity policy, and the apparent unworkability of the co-operative arrangements set out in the Draft ACCC-CDPP MOU – see Part 13;

the substantial limits placed on the capacity of respondents and third parties to obtain access to information and documents from the ACCC by virtue of the “protected cartel information” scheme – see Part 14;

the fact that the new cartel offences will not be tried exclusively in the Federal Court – see Part 15;

the need for guidelines, including worked examples, to clarify and explain a range of matters, including: the Draft ACCC-CDPP MOU, particularly as it relates to the decision to initiate a criminal investigation and to immunity (see Parts 11 and 13); the circumstances in which different investigatory powers will be invoked, the procedures that will be employed and the management of parallel criminal and civil investigations (see Part 12); the provisions of the Exposure Draft Bill relating to “protected cartel information” (see Part 14); and the legal rules and administrative arrangements for guarding against the risk of abuse from the concurrent pursuit of criminal and civil proceedings (see Part 16); and

the maximum penalties for individual and corporate offenders which are open to question – see Part 17.

The extent to which these issues and possible concerns will be addressed as a result of the consultation process is unclear – see Part 18 (Conclusion).
2. INTRODUCTION – THE EXPOSURE DRAFT MATERIALS

On 11 January 2008 the Government released exposure draft materials (“Exposure Draft Materials”) relating to the proposed criminalisation of serious cartel conduct in Australia. The documents released are: a discussion paper (“Discussion Paper”) including a brief explanatory abstract, an exposure draft bill containing proposed amendments to the *Trade Practices Act 1974* (Cth) (“Exposure Draft Bill”) and a draft memorandum of understanding between the Australian Competition and Consumer Commission (“ACCC”) and the Commonwealth Director of Public Prosecutions (“CDPP”) setting out proposed co-operative arrangements between the two agencies (“Draft MOU”). Submissions to Treasury on the materials are sought by 29 February 2008.

The Exposure Draft Bill and the Draft MOU are consistent largely with the proposals set out in the former Treasurer’s Press Release of 2 February 2005 (“Treasurer’s Press Release”). They thus appear to reflect the point reached in the development of a criminal cartel regime at the time when the former Coalition Government lost the election in November 2007. The new Government has indicated that it may wish to amend the Exposure Draft Bill in light of submissions received in the current consultation process. The timing for the consideration of submissions and the formulation of amendments has not been indicated, but the Government’s election promise is to introduce the legislation this year.

The release of the Exposure Draft Materials is most welcome. It is now possible for the first time to see the specific legislative changes proposed as well as the particular terms of the Draft MOU that has been drafted by the ACCC and the CDPP on the questions of the roles of and co-operation between these agencies in enforcing the new regime.

The Exposure Draft Bill contains numerous amendments to the *Trade Practices Act 1974* (Cth). Many of the proposed amendments are complex. Several are highly controversial. Some are surprising because they go far beyond the proposals foreshadowed by the Report of the Dawson Committee in 2003 (“Dawson Report”) and the Treasurer’s Press Release.

Few would dispute the merits of criminalising serious cartel conduct in principle. However, the specific means of implementation proposed in the Exposure Draft Materials raise many questions. The aims of this paper are:

(a) to outline the key features of the Exposure Draft Bill and the Draft MOU and to give a basic explanation of the proposed amendments to the *Trade Practices Act 1974* (Cth);

(b) to draw attention to the main legal and policy issues raised by the Exposure Draft Materials; and

(c) to highlight areas in which changes should be made or further work needs to be done.
In preparing this paper we have been hampered by the absence of any detailed discussion or explanatory paper. The Discussion Paper is a document of merely 7 pages. The Treasurer’s Press Release was 13 pages in length and at the time no other material was made available. The Treasurer’s Press Release purports to be based on a report of a working party commissioned by the previous Treasurer to consider the steps required to implement the in-principle recommendation of the Dawson Committee that serious cartel conduct should be made an offence punishable by jail. That report (“Working Party Report”) has never been released and is the subject of proceedings under the *Freedom of Information Act* 1982 (Cth).

It is difficult to review the proposed amendments to the *Trade Practices Act* 1974 (Cth) without the aid of a consolidated version of the legislation with all proposed changes incorporated in the text. An “unofficial” consolidated version of the relevant provisions has been prepared by Caron Beaton-Wells and is available from the Melbourne Law School website (at http://www.masters.law.unimelb.edu.au/index.cfm?objectId=CFBA64BE-1422-207C-BA6DC09C63142583).

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3. DIFFERENTIATING BETWEEN CRIMINAL AND CIVIL PROHIBITIONS

3.1 How the Exposure Draft Materials differentiate between criminal and civil prohibitions

3.1.1 Exposure Draft Bill

The Exposure Draft Bill differentiates between criminal and civil prohibitions in these main ways:

- Liability for the new cartel offences results in a conviction and the stigma (and other disqualifying and exclusionary consequences) associated with a conviction for an offence, especially a serious offence.
- The offences are indictable and triable by a jury.
- Liability must be established by proof beyond a reasonable doubt whereas liability under a civil penalty provision requires proof on the balance of probabilities.
- Individual liability for the cartel offences carries the possibility of a jail sentence.\(^2\)
- An “intention dishonestly to obtain a benefit” is an element of the cartel offences but not the civil penalty prohibitions.
- The default fault provisions of the Criminal Code (Cth) apply to the cartel offences but not the civil penalty prohibitions.
- Prosecutions are handled by the CDPP, not the ACCC.

3.1.2 Draft MOU

The Draft MOU sets out factors that differentiate between criminal and civil prohibitions at the level of enforcement or prosecutorial discretion, at least by implication. In summary:

- The ACCC will concentrate upon cartel conduct of the type that can cause large scale or serious economic harm. One consideration to which the ACCC will have regard is the volume of affected commerce. The volume of affected commerce is to be assessed on the basis of whether or not:

\(^2\) Ironically the maximum fine for individuals is lower than the maximum civil monetary penalty – see Part 17.
the value of the affected commerce would exceed $1 million within a 12 month period (that is, where the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed $1 million within a 12 month period); or

in the case of bid rigging, the value of the bid or series of bids exceeded $1 million within a 12 month period.

In considering whether a prosecution should be commenced the CDPP will have regard to:

- the impact of the cartel on the market;
- the scale of the detriment caused to consumers or the public; and
- whether any of the cartel members have previously been found by a criminal or civil court, or admitted, to have engaged in cartel behaviour.

### 3.1.3 Discussion Paper

The Discussion Paper focuses on the element of an “intention dishonestly to obtain a benefit”, which is taken to be a prime means of differentiating between criminal and civil penalty prohibitions against cartel conduct.

The Discussion Paper asserts that no distinction is drawn between criminal and civil liability in the definition of cartel conduct under s 1 of the *Sherman Act* 1890 (US) and that a different approach is needed in Australia.

The Discussion Paper requests submissions on whether there should be a distinction between the criminal and civil penalty prohibitions and, if so, how that distinction should be made in the legislation. The Discussion Party refers to the possibility of using the concepts of fraud and/or secrecy as differentiators.

### 3.2 Do the Exposure Draft Materials adequately differentiate between criminal and civil prohibitions?

#### 3.2.1 What is the framework of inquiry for differentiating between criminal and civil prohibitions?

The Discussion Paper does not canvas the various possible means that could be used to differentiate between the criminal and civil prohibitions proposed in the Exposure Draft Bill but focuses on a highly selective number of possible options, namely reliance on the concepts of dishonesty, fraud and/or secrecy.
7 March 2008

The Dawson Report\(^3\) does not set out a framework of inquiry for differentiating between civil and criminal prohibitions. The Working Party Report may do so but has not been published. The Criminal Justice Division of the Attorney-General’s Department has published *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (February 2004),\(^4\) which is useful when considering what the framework of inquiry should be. The discussion in the Australian Law Reform Commission’s Report, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Report 95, 2002) is also relevant.\(^5\)

The main ways in which criminal and civil prohibitions have been differentiated in the past are:

- the name given to the offence and the connection between that name and existing offences recognised by the community as prohibiting criminal conduct;

- the type and the maxima of the penalties that can be imposed;

- the mode of trial and the nature of the court’s jurisdiction;

- the type of enforcement action available and the enforcement agency responsible for the conduct of enforcement actions;

- the rules of evidence that apply, especially the need to prove an offence beyond reasonable doubt;

- the rules of procedure that apply, including the powers of investigation that are available;

- the conventional obligations imposed on prosecutors – for example, the obligation to make all the evidence, including exonerating evidence, available to the accused;

- the definition of the fault elements of the offence;\(^6\)

- the definition of the physical elements of the offence;

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the application of general principles of criminal responsibility;

- the definition and scope of exemptions and defences;

- the exercise of prosecutorial discretion in a manner that reflects the above factors plus additional indicators of offence seriousness (e.g. gravity of harm; degree of culpability) and the public interest in the prosecution of criminal offences.

Are the Exposure Draft Materials based on a systematic assessment of all of the ways in which the proposed criminal and civil prohibitions could be differentiated? The basic framework set out above raises numerous questions about the approach to differentiation taken in the Exposure Draft Materials: see Part 3.3.1.

### 3.2.2 Is the concept of dishonesty (or fraud) a necessary or sufficient differentiator?

The concept of an intention dishonestly to obtain a benefit does not sufficiently distinguish criminal from civil prohibitions. Dishonesty is likely to be present in so many civil penalty cases that it would be implausible to say that it is the hallmark of criminal cartel conduct only.

Dishonesty has been criticised on the basis that it is an unnecessary and problematic element of a cartel offence. The criticisms are summarised in Part 6.

Reliance on the concept of fraud instead of the concept of dishonesty would not overcome the problems discussed in Part 6. Unless defined in terms of dishonesty and in the way that dishonesty is defined in the Exposure Draft Bill, “fraud” would raise issues and difficulties of interpretation (as is evident from the High Court’s attempts to clarify what that concept means).

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8 This is implicitly recognised by s 85(6). The power to excuse a defendant under this provision is based partly on the concept of honesty and applies to civil and criminal prohibitions against cartel conduct.


3.2.3 Is the concept of secrecy a necessary or sufficient differentiator?

The concept of secrecy does not appear to be a necessary or sufficient differentiator between criminal and civil prohibitions against cartel conduct:11

- It is far from apparent why brazen cartels and cartels of defiance that thumb their noses at the authorities and the community should be excluded from criminal liability for a cartel offence.12

- Confidential discussions understandably and justifiably occur widely in the normal course of commerce and may involve an innocuous intent to conceal the fact that they are taking place.

- The fact that price fixing has been agreed to in secret does not itself necessarily mean that the conduct is serious or harmful – the seriousness or harmfulness of the conduct depends primarily on other factors including the duration of the cartel and the volume of affected commerce.

3.3 Alternative possible approaches?

3.3.1 Systematic differentiation?

The basic framework of inquiry set out in Part 3.2.1 would recognise the fundamental importance of the need for the cartel offences to be proven beyond a reasonable doubt (a prime differentiator emphasised by Justice Gyles in his commentary on an earlier version of this paper).13 It would also draw attention to further possible means of systematically differentiating between criminal and civil prohibitions against cartel conduct. The more significant further possible means of differentiation are as follows:

- The title “cartel offence” seems prosaic. Alternative possibilities would include “conspiracy to subvert competition” (if the offence is redefined as a form of conspiracy)14 or “collusive market subversion”.

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12 Overt cartel conduct is rare but does occur. The OPEC price fixing arrangements are a notorious example; see Esan A, “The Legality of OPEC under US Antitrust Law and EC Competition Law” (2005), available at http://www.dundee.ac.uk/cepmlp/car/html/car8_article11.pdf. Overt but sham joint ventures are further examples; see eg, General Leaseways, Inc v National Truck Leasing Association, 744 F 2d 588 (CA 7th Cir, 1984).
The maximum fines for corporations would be higher than the maximum penalties for civil penalty prohibitions – see Part 17.

The maximum fines for individuals would be higher than the maximum penalties for civil penalty prohibitions – see Part 17.

The fault element could be a common purpose to achieve the object of price fixing, bid rigging, output reduction or market division, based on the element of common purpose required for conspiracy at Australian common law.\(^\text{15}\) Contrast the problematic concept of the “purpose of a provision” in s 44ZZRD(2), as discussed in Part 7.2.2 below.

The physical elements of the offences could be defined more narrowly than the physical elements of the civil penalty prohibitions – see Part 5 below. By contrast, the Exposure Draft Bill defines the physical elements of the new cartel offences in the same way as for the new civil penalty prohibitions (see the definition of a “cartel provision” in s 44ZZRD).

The general principles of criminal responsibility under the Criminal Code (Cth) require fault as a condition of corporate criminal liability and individual criminal liability.\(^\text{16}\) By contrast, the Exposure Draft Bill would subject corporations and individuals to vicarious criminal responsibility for the fault of an employee or agent (see s 84(1)(3); s 6AA(2)).\(^\text{17}\) See Parts 8 and 9.

The scope and definition of exemptions and defences would be geared to the new cartel offences and would not necessarily be limited to, or co-defined with, the exemptions and defences that apply to civil penalty prohibitions.\(^\text{18}\) By contrast, under the Exposure Draft Bill the new cartel offences are not subject to a joint venture defence corresponding to that now available under ss 76C and 76D; s 44ZZRO provides for a joint venture defence only in relation to the new civil penalty prohibitions (and only for unincorporated joint ventures) – see Part 10. Moreover, unlike the offence of conspiracy under the Criminal Code (Cth), the new cartel offences are not subject to a defence of withdrawal.\(^\text{19}\)

The Draft MOU does not reflect all the factors relevant to differentiating criminal from civil prohibitions. Questions arise about the indicators of offence-seriousness that are set out in the Draft MOU – see Part 11 below.


\(^{16}\) Criminal Code (Cth) ss 5.1, 5.6, 12.3.

\(^{17}\) However, under s 84(4A), the imposition of vicarious criminal responsibility on the basis of s 84(3) or (4) precludes a jail sentence.


\(^{19}\) Contrast Criminal Code (Cth) s 11.5(5).
3.3.2 Pragmatic select improvements?

A systematic re-examination of all the possible differentiators between criminal and civil prohibitions may not occur given the Government’s election promise to criminalise serious cartel conduct within its first year in office.

Pragmatic select improvements would include:

- removing the concept of dishonesty from the definition of the new cartel offences – see Part 6 below;

- tightening up the fault elements for the new cartel offences and making the fault elements explicit in the definition of the offences\(^{20}\) - see Part 7 below;

- avoiding the strictness of vicarious responsibility under the new cartel offences by making a defence of reasonable precautions available to individual and corporate defendants – see Parts 8 and 9 below;

- revising the scope and definition of exemptions and defences, at least to the extent of making the new cartel offences subject to: (a) a joint venture defence; and (b) an exemption corresponding to the exclusive dealing exemption under s 45(6) – see Part 10 below; and

- expanding and enhancing the Draft MOU – see Part 11 below.

4. THE NEW REGIME OF PROHIBITIONS

4.1 The new regime

4.1.1 New cartel offences

Section 44ZZRF creates the offence of making a contract or arrangement or arriving at an understanding containing a cartel provision:

(1) A corporation commits an offence if:

(a) the corporation makes a contract or arrangement, or arrives at an understanding, with the intention of dishonestly obtaining a benefit; and

(b) the contract, arrangement or understanding contains a cartel provision.

Section 44ZZRG creates the offence of giving effect to a cartel provision:

(1) A corporation commits an offence if:

(a) a contract, arrangement or understanding contains a cartel provision; and

(b) the corporation gives effect to the cartel provision with the intention of dishonestly obtaining a benefit.

By virtue of s 6 (as proposed to be amended) there will be certain limited circumstances in which the new cartel offences and civil penalty prohibitions under the new Division 1 of Part IV will apply to persons other than corporations. Generally otherwise, the Schedule Version of the cartel offences and civil penalty prohibitions will apply to a “person”.

“Cartel provision” is defined in s 44ZZRD, as discussed in Part 5 of this paper.

The offence under s 44ZZRG applies to contracts or arrangements made, or understandings arrived at, before, at or after the commencement of the section (s 44ZZRG (3)). There is no time limit on prosecution - see Part 17.4 below.

4.1.2 New civil penalty prohibitions

Section 44ZZRJ creates the civil penalty prohibition of making a contract or arrangement or arriving at an understanding containing a cartel provision: 
(1) A corporation contravenes this section if:

(a) the corporation makes a contract or arrangement, or arrives at an understanding; and

(b) the contract, arrangement or understanding contains a cartel provision.

Section 44ZZRK creates the civil penalty prohibition of giving effect to a contract or arrangement or arriving at an understanding containing a cartel provision:

(1) A corporation contravenes this section if:

(a) a contract, arrangement or understanding contains a cartel provision; and

(b) the corporation gives effect to the cartel provision.

“Cartel provision” is defined in s 44ZZRD, as discussed in Part 5.

The civil penalty prohibition under s 44ZZRK applies to contracts or arrangements made, or understandings arrived at, before, at or after the commencement of the section (s 44ZZRK(2)).

4.1.3 Changes to existing civil penalty prohibitions

The Exposure Draft Bill preserves the civil penalty prohibitions under s 45 against contracts, arrangements or understandings that: (a) contain an exclusionary provision (as defined by s 4D); or (b) have the purpose, effect or likely effect of substantially lessening competition in a market.

The Exposure Draft Bill deletes s 45A. Price fixing is prohibited per se under the new cartel offences (ss 44ZZRF, 44ZZRG) and the new cartel civil penalty prohibitions (ss 44ZZRJ, 44ZZRK). By virtue of the definition of “cartel provision” in s 44ZZRD(2), the definition of price fixing under these provisions differs in several significant ways from the definition under s 45A(1) – see Part 5 of this paper.

4.2 Problems with this structure?

The proposed new regime of prohibitions is complex and does not reflect the following desiderata:

- the desirability of defining criminal and civil liability separately;
- the need to define criminal liability narrowly;
the need to rectify known problems arising under the existing civil penalty prohibitions; and

the need to define new civil penalty prohibitions in a manner that covers the types of conduct that warrant per se prohibition without also catching conduct that is innocuous or not plainly anti-competitive.

See further the discussion in Part 5 to follow.
5. THE PHYSICAL ELEMENTS OF THE NEW CARTEL OFFENCES AND NEW CIVIL PENALTY PROVISIONS

5.1 Outline of the physical elements of the new cartel offences and new civil penalty prohibitions

Under the *Criminal Code* (Cth) an offence consists of physical elements and fault (mental) elements.

The physical elements of the cartel offences under ss 44ZZRF and 44ZZRG are respectively:

- the making of a contract or arrangement or arriving at an understanding (CAU) that contains a cartel provision;
- the giving effect to a cartel provision.

Under the *Criminal Code* (Cth) a physical element may be “conduct”, “a result of conduct” or “a circumstance in which conduct or a result of conduct occurs.” The characterisation of a physical element has implications for the fault element of the offence (see Part 7).

The physical elements of the new civil penalty prohibitions are the same as for the new cartel offences – see ss 44ZZRJ and 44ZZRK. This is undesirable. Pursuant to the doctrine of one-dimensional interpretation espoused in *Waugh v Kippen* (1986) 160 CLR 156 at 165, where the same wording is used for the purposes of criminal and civil proscription, the same interpretation must be adopted in both contexts (the legislature cannot be taken to have spoken “with a forked tongue”). However, a prohibition defined in the same way for the different particular contexts of criminal liability and civil liability is likely to be problematic. A narrow interpretation may be justified for criminal liability, for example, but may not be warranted for the civil penalty context and, for that matter, may be quite unjustifiable for the purposes of civil remedies. Conversely, a broad interpretation adopted to suit the context of civil remedies may be too broad for the purposes of a civil penalty and quite unjustified as the basis for criminal liability.

These considerations are relevant to the question of differentiation between criminal and civil prohibitions (see Part 3). In particular, regardless of whether or not the element of dishonesty is retained, they support the view that the physical elements of the new cartel offences should be defined separately from and more narrowly than the physical elements of the new civil penalty prohibitions.

A further remarkable and surprising feature of Exposure Draft Bill, as elaborated in this Part, is that the concept of a cartel provision is novel and far-reaching. This radical change in the law was not discussed in the Dawson Report and no discussion of or justification for this change has been
given. It has the effect that conduct that is currently lawful will be unlawful under the new prohibitions and will attract not only civil, but also potentially, criminal penalties.

5.2 Contract, arrangement or understanding

The new cartel offences and new civil penalty prohibitions retain the concept of CAU from s 45.

Proof of an arrangement or understanding has been problematic in s 45 cases. Recently, the evidentiary challenges have been highlighted by the approach taken to establishing the requisite “meeting of the minds” between alleged colluders. In particular, there has been judicial emphasis on the need to prove some form of a commitment or undertaking or at least some moral obligation by at least one of the participants in the arrangement. There may be some debate as to whether this in fact represents a change in the law (ie a stricter approach than in cases such as Trade Practices Commission v Email Ltd (1980) 31 ALR 53).

Some, not least the ACCC, have expressed concern that satisfying the CAU requirement will be extremely difficult to the criminal standard, beyond a reasonable doubt. There is some substance in this concern. In its recent report on its inquiry into the petrol prices, the ACCC suggested a form of legislative amendment to deal with the issue, based on the view that it was Parliament’s original intention that the “conscious or intentional creation of an ‘expectation’ regarding future conduct may be sufficient to create an ‘understanding’ for the purposes of s 45”.

The Exposure Draft Materials make no mention of this issue, presumably because it has yet to be considered in detail by the new government, and has been placed on the list of items on the competition law agenda for 2008. The reality nevertheless is that any attempt by the government to lessen the requirements to establish collusion for the purposes of the new cartel offences is likely to be met with stiff opposition. The Australian concept of a CAU is already much wider

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25 See, for example, the comments of Professor Baxt, cautioning against a “knee-jerk” reaction to law reform in this instance, and generally. The comments were made in a commentary by Professor Baxt at a seminar, “Criminalising Cartel Conduct: Issues of Law and Policy”, University of Melbourne, 25 February 2008.
than some of its overseas counterparts. The concept of “agreement” under s 188 of the Enterprise Act 2002 (UK) in the United Kingdom is narrower than an “arrangement” or “understanding.”

Similarly, in the United States, the position remains essentially that the parties to an alleged concerted action must be proven to have had “a conscious commitment to a common scheme designed to achieve an unlawful objective.”

Certainly, if the ACCC proposal is to be entertained, it should be in the context only of the civil penalty prohibitions. Further relaxation of the requirements for proof of conspiracy in the criminal context is difficult to justify.

In any event, at this stage there is a good case for allowing judicial interpretation of the elements required to prove an “understanding” to continue to develop, particularly on the question of the extent to which inferences may be drawn from parallel conduct. It may well be that the concerns expressed by the ACCC and others are not realised to any significant degree outside of the specific challenges posed by proof of conspiracy in the petrol industry. Given the extent to which cartel cases have been settled by the ACCC in the past, there has been very little opportunity for the courts to explore these issues fully in contested proceedings. This may change with the introduction of a criminal regime and the greater motivation on the part of defendants to test ACCC allegations, given the consequences of admission, in borderline cases. That said, it should be recognised that, compared with civil cases, criminal prosecutions are likely to be rare.

5.3 Cartel provision

“Cartel provision” is defined in s 44ZZRD.

Pursuant to s 44ZZRD(1), a provision is a cartel provision if two conditions are satisfied in relation to the provision:

(a) the purpose / effect condition set out in subs (2);

(b) the competition condition set out in subs (3).

These conditions can be satisfied when the provision is considered with related provisions (s 44ZZRD(7)).

“Party” has an extended meaning such that if a body corporate is a party to a CAU, each related body corporate is taken also to be a party (s 44ZZRC).

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26 See, in particular, the effect of s 188(3).
5.3.1 Purpose / effect condition

Under s 44ZZRD(2), the purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:

(a) price-fixing as defined in para (a);

(b) restricting outputs in the production and supply chain (otherwise generally referred to as “output restriction”) as defined in para (b);

(c) allocating customers, suppliers or territories (otherwise generally referred to as “market division”) as defined in para (c);

(d) bid-rigging as defined in para (d).

The difficulties arising out of the retention of the concept under s 45 that the provision have the relevant purpose are referred to in Part 7.3.

A provision is not to be taken not to have the requisite purpose, likely effect or effect because of the form or description of the provision or CAU (s 44ZZRD(8)).

A Impact on existing per se prohibitions

Section 45A is to be repealed with the effect that the only per se prohibitions on price fixing under the *Trade Practices Act 1974* (Cth) are the prohibitions in the new cartel offences and the civil penalty prohibitions.

However, the per se prohibition on exclusionary provisions, as defined in s 4D, under s 45(2)(a)(i) and s 45(2)(b)(ii) remains.

The breadth of s 4D has been criticised heavily. In particular, concern has been expressed that it catches arrangements that:

- may not be sufficiently anti-competitive, and may even be pro-competitive (eg joint ventures);

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relate to persons or classes of persons that are not competitors or potential competitors of the parties to the arrangement and such persons may simply be affected, without being targeted, by the parties.

The Dawson Report accepted these concerns, recommending that there be a defence that the exclusionary provision did not have the purpose, effect or likely effect of substantially lessening competition, and that the persons or classes of persons to which the exclusionary provision relates be restricted to a competitor or competitors (actual or potential) of the parties to the arrangement. Despite accepting these recommendations initially, the government subsequently decided instead simply to extend the joint venture defence, then only available for price fixing, to exclusionary arrangements, taking the view that any remaining concerns had been ameliorated by the High Court’s interpretation of s 4D in decisions handed down after the Dawson Report.

However, the difficulties identified in the Dawson Report with respect to s 4D have not been resolved and, if anything, concerns about the per se prohibition on exclusionary provisions are likely to be heightened by the fact that the CP definitions are, in several respects, broader in their scope than s 4D (see Part 5.3.1C below) and by the proposal to attach criminal penalties to breach of the prohibition (in circumstances in which dishonesty is present). In effect, the Exposure Draft Bill proposes to make criminal conduct that is currently lawful. Such a significant policy change demands explanation. None has been provided.

Furthermore, by retaining the current per se prohibition on exclusionary arrangements the Exposure Draft Bill creates a multi-layered system of provisions applicable to cartel conduct that is complicated and likely to add expense and time to litigation. Given these considerations, there is a good case for repealing the current per se prohibition on exclusionary provisions and tightening up the proposed new civil penalty prohibitions (particularly as they relate to output restriction and market division) so as to ensure that they only catch conduct that warrants the status or per se illegality.

B Price-fixing

Under s 44ZZRD(2)(a) the concept of price-fixing is defined as:

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32 Trade Practices Act 1974 (Cth) s 76C.
(a) fixing, controlling or maintaining the price for, or a discount, allowance, rebate or credit in relation to:

(i) goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or

(ii) goods or services acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or

(iii) goods or services re-supplied, or likely to be re-supplied, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or

(iv) goods or services likely to be re-supplied by persons or classes of persons to whom those goods or services are likely to be supplied by any or all of the parties to the contract, arrangement or understanding

(“the new price-fixing definition”).

“Likely” is defined as including a possibility that is not remote (s 44ZZRB).

Genuine price recommendations will not be caught (s 44ZZRD(5)).

B1 How does the new definition compare with s 45A?

There are differences between the new definition and the definition in s 45A:

- The new definition does not include “providing for the fixing, controlling or maintaining of.” Without an explanatory note, it is not clear why this is the case, especially given recent case law in which “providing for” has been interpreted narrowly as “arranging for” or “stipulating” in the sense of being a means to an end. That said, there is also a view that a CAU to fix prices necessarily relates to the future object of fixing prices and hence “providing for” is redundant. In addition, conduct that might have been characterised as “providing for” the fixing of prices could be covered by the possibility of liability for attempt.

- It follows from the preceding point that the new definition does not include reference to the “proposed parties” to the “proposed contract, arrangement or understanding.”

34 Apco Service Stations Pty Ltd v ACCC (2005) 159 FCR 452.
35 See s 11.1 of the Criminal Code (Cth).
Downstream price-fixing is covered as it was under s 45A(7), however:

- the new definition covers likely re-supply (see paras (iii)-(iv), whereas s 45A(7) did not; and
- for the purposes of the new definition, it is made explicit that it is immaterial whether:
  - the persons re-supplying or likely to be re-supplying the goods or services under paras (iii)-(iv) can be ascertained (s 44ZZRD(4));
  - the supply or acquisition happens, or happens in particular circumstances or particular conditions (s 44ZZRD(6)).

This appears to be an attempt to avoid the difficulties that have arisen with similar concepts under s 4D.

**B2 Is the new definition of price fixing too broad?**

The new price fixing definition may be too broad, at least in connection with the new cartel offences, if not also the new civil penalty prohibition.

The new definition does not exclude situations where, as in case brought by the ACCC against National Australia Bank Limited in 2000 in the credit card interchange fee matter, A and B enter into a CAU for the supply of services in an upstream market where they do not compete with each other and a provision of the CAU has the likely effect of controlling the price of goods or services in a downstream market where they do compete (Federal Court of Australia, *Statement of Claim*, (No N948 of 2000). Submissions were made to the Dawson Committee that this type of conduct should not be treated as an offence.\(^{36}\) Certainly it is questionable whether the cartel offence should apply in such situations. However, the requirement of dishonesty does not address this question except perhaps in an oblique and obscure way and will not necessarily exclude such situations.\(^{37}\)

The new definition does not exclude maximum price fixing by sellers. There is no cogent policy justification for so broad a per se prohibition, civil or criminal.\(^{38}\)

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\(^{37}\) Cf the approach taken in s 189 of the *Enterprise Act* 2002 (UK).

No attempt has been made to clarify and limit the meaning of the words “fixing, controlling or maintaining” a price, or the word “effect” in the new price-fixing definition. For example, arguably there is a need to qualify the words “fixing, controlling or maintaining” given the sweeping proposition of Lindgren J *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375 at [178] that degrees of control are irrelevant when determining if a provision has the effect of “controlling” a price. The idea that any degree of control is sufficient to amount to “controlling” a price is implausible and Lindgren J’s interpretation does not reflect the dictionary meaning that to “control” is “to hold sway over, exercise power or authority over, to dominate or command.”

### C Restricting outputs in the production and supply chain

Under s 44ZZRD(2)(b), the concept of output restriction is defined as:

(b) preventing, restricting or limiting:

(i) the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or

(ii) the capacity, or likely capacity, of any or all of the parties to the contract, arrangement or understanding to supply services; or

(iii) the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding;

(“the new output restriction definition”)

There are significant differences between the new output restriction definition and s 4D. Confusingly, in some respects the new definition is wider and in others, narrower. There is no explanation for these changes in the Exposure Draft Materials.

First, the new output restriction definition relates to restrictions on production (defined broadly in s 44ZZRB), capacity and supply, whereas s 4D is limited to supply.

Secondly, s 4D catches restrictions on acquisition whereas, curiously, these are not covered by the new output restriction definition.

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Thirdly, whereas s 4D caught only arrangements that have an exclusionary purpose, the new output restriction definition covers also arrangements that have a restrictive effect. For the purposes of the new cartel offences, however, it is to be borne in mind that the default fault element of recklessness will apply in establishing the relevant effect (see Part 7.1). That said, recklessness will not be particularly difficult to establish (see Part 7.4). For the purposes of the new civil penalty prohibitions, it will not be necessary to show that the respondent was reckless in relation to the exclusionary effect.

Significantly, as a result of the inclusion of “effect” as an alternative to “purpose”, the new CP definition (s 44ZZRD(b)(iii) especially) is wider than the current per se prohibition and thus will have even greater potential to catch conduct that is not substantially anti-competitive or may even be pro-competitive (particularly in cases in which the joint venture defence is not available). Furthermore it will catch conduct that, under s 47 (the prohibition on exclusive dealing), would be subject to a substantial lessening of competition test. Yet there is no proposal for an overlap exemption (as under s 45(6)) to apply (see Part 10.5). No justification for this major change in the law has been provided, and none is self-evident.

Fourthly, in an apparent attempt to avoid the difficulties that have arisen under s 4D with the concept of “particular classes of persons”, s 44ZZRD(4) makes the identification of such persons immaterial. However, this arguably does not resolve the ongoing difficulty associated with the question whether the relevant persons have to be targeted by the offending provision. Unlike s 4D under which it is necessary to prove an exclusionary purpose, the new output restriction definition is satisfied by proof alternatively of an exclusionary effect or likely effect (this follows from s 44ZZRD(1)). In this way, the “targeting” issue can be avoided.

Finally, s 44ZZRD(6) makes it immaterial whether for the purposes of the new output restriction definition, a supply, likely supply or production happens or is to happen or capacity or likely capacity exists or is to exist “in particular circumstances or on particular conditions”. Thus, the new definition covers general restrictions on production or capacity, for example, without specification as to the circumstances or conditions of the restriction. Section 4D, by comparison, refers to preventing, restricting or limiting supply “in particular circumstances or on particular conditions” and is thus narrower in its scope.

**D Allocating customers, suppliers or territories**

Under s 44ZZRD(2)(c) the concept of market division is defined as:

(c) allocating between any or all of the parties to the contract, arrangement or understanding:

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(i) the persons or classes of persons who have acquired, or who are likely to acquire, goods or services from any or all of the parties to the contract, arrangement or understanding; or

(ii) the persons or classes of persons who have supplied, or who are likely to supply, goods or services to any or all of the parties to the contract, arrangement or understanding; or

(iii) the geographical areas in which goods or services are supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or

(iv) the geographical areas in which goods or services are acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding;

(“the new market division definition”).

The activities covered by this definition would have been covered by s 4D. On the one hand the addition of geographical areas could be seen as extending the definition (s 4D being confined to allocation between persons). On the other hand, the practical effect of dividing a market on the basis of customers in Victoria being allocated to X and customers in New South Wales being allocated to Y, for example, would be the same as dividing a market on the basis of allocating Victoria to X and New South Wales to Y.

The new market division definition also goes further than s 4D in that it catches arrangements that have the effect or likely effect of allocating customers, etc whereas s 4D caught only arrangements with that purpose. Again, for the purposes of the new cartel offences, the default fault element of recklessness will apply in establishing the relevant effect, although again in this context it should recognised that the recklessness will not be particularly difficult to establish (see Part 7.1, Part 7.4). For the purposes of the new civil penalty prohibitions, it will not be necessary to show that the respondent was reckless in relation to the allocative effect.

As with the new output restriction, the effect limb of the purpose/effect condition in relation to market division will mean that conduct that is not substantially anti-competitive may fall within the definition of a cartel provision and thus attract civil penalties and possibly also criminal penalties. No justification for this major change in the law has been provided, and none is self-evident.

In addition, as discussed in relation to the new output restriction definition, the new provisions in ss 44ZZRD(4) and (6), relating to the immateriality of whether the identities of persons can be
ascertained and whether supply happens or is to happen in particular circumstances or on particular conditions, appear to be an attempt to make market division easier to prove.

Issues may arise as to the meaning of “allocating” and how formal, explicit or structured the allocation has to be. Such issues are aggravated by the inclusion of “effect”, and even more so an indirect effect, in the purpose/effect condition of the definition of a cartel provision. These aspects of the definition would appear to allow for a passive allocation to be caught by the new prohibition – that is, a division of customers or territories that is a mere by-product (as distinct from an intended outcome) of an otherwise efficient or pro-competitive arrangement.

E Bid rigging

Under s 44ZZRD(2)(d) the concept of bid rigging is defined as:

(d) ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:

(i) one or more parties to the contract, arrangement or understanding bid, but one or more other parties do not; or

(ii) two or more parties to the contract, arrangement or understanding bid, but at least two of them do so on the basis that one of those bids is more likely to be successful than the others; or

(iii) two or more parties to the contract, arrangement or understanding bid, but not all of those parties proceed with their bids until the suspension or finalisation of the request for bids process; or

(iv) two or more parties to the contract, arrangement or understanding bid and proceed with their bids, but at least two of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or

(v) two or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding

(“the new bid rigging definition”).
The activities covered by the new bid-rigging definition would have been covered by s 45A, and presumably would be caught by the new price-fixing definition given its reference to “controlling” of price.\(^{42}\)

“Bid” includes “the taking, by a potential bidder, of a preliminary step in a bidding process” (s 44ZZRB).

Consortium bidding could easily be caught by the new bid rigging definition. Questions such as whether members of the consortium would have been independent bidders in the absence of the consortium arrangement and whether the arrangement prevents members from submitting a separate independent bid are likely to be highly relevant in this regard.

The new bid rigging definition does not exclude “rigging” consented to by the person requesting the bids (cf s 188(6) of the Enterprise Act 2002 (UK)). This appears an oversight.

5.3.2 Competition condition

Under s 44ZZRD(3) the competition condition is satisfied if:

\[
\begin{align*}
\text{… at least two of the parties to the contract, arrangement or understanding:} \\
(a) & \text{ are or are likely to be; or} \\
(b) & \text{ but for any contract, arrangement or understanding, would be or would be likely to be;} \\
(c) & \text{ in competition with each other in relation to [the supply, likely supply, acquisition, likely acquisition, re-supply, likely re-supply, production, likely production, capacity to supply, likely capacity to supply] the goods or services that are the subject of the relevant purpose/effect condition in s 44ZZRD(2).}
\end{align*}
\]

This condition corresponds with the requirement under the per se limbs of s 45 that at least two of the parties to the CAU be or would be, but for the CAU, in competition with each other and that the competition coincide with the goods and services that are the subject of the offending provision (see s 45A(8); ss 4D(1)(a), (2)).

However, for the new cartel offences, arguably all the parties to the CAU should be required be in competition with each other. Criminal liability should not apply to parties that are in vertical relationships with the competitor parties to the CAU given that the restraints imposed by the CAU

\[^{42}\text{See, eg, Australian Competition and Consumer Commission v CC (NSW) Pty Ltd (1999) 92 FCR 375.}\]
on these parties will fall within the scope of the exclusive dealing or resale price maintenance prohibitions or, if not, the civil penalty prohibitions (existing and/or new) on cartel conduct.

Note there is no provision corresponding to s 45(3); however, this may be covered by s 44ZZRD(3).

### 5.3.3 Meaning of expressions in other provisions of the *Trade Practices Act 1974* (Cth)

Section 44ZZRE provides that Division 1 is to be disregarded in determining the meaning of an expression in a provision of the *Trade Practices Act 1974* (Cth) (other than a provision in Division 1, subs 6(2)(c) or s 76(1A)(aa)). In the absence of an explanatory note, the intention of the drafters in relation to this section can only be speculated upon.

One explanation for s 44ZZRE is that some of the provisions in the new Division 1 of Part IV proposed by the Draft Exposure Bill relate to criminal provisions and hence may be interpreted narrowly. The same wording is used in places in s 45(2) and s 4D that are unaffected by the draft exposure bill. The drafters appear to want to leave open the possibility for the words in the existing civil penalty prohibitions under s 45(2) to be interpreted less restrictively than the same words used in connection with the new cartel offences. Of itself, this is understandable. However, it appears to overlook the requirement referred to in Part 5.3.1 that, generally, where the same wording is used for the purposes of criminal and civil proscription, the same interpretation must be adopted in both contexts.
6. THE ELEMENT OF “INTENTION DISHONESTLY TO OBTAIN A BENEFIT”

6.1 Intention dishonestly to obtain a benefit as a prime element of the new cartel offences

The new cartel offences under ss 44ZZRF and 44ZZRRZG require an “intention dishonestly to obtain a benefit.” This requirement is projected in the Discussion Paper as a prime element of the offences and a key point of differentiation between the cartel offences and the civil penalty prohibitions.

Under s 44ZZRB, “dishonest” means:

(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant to be dishonest according to the standards of ordinary people.  

Under s 44ZZRH(1) the determination of dishonesty is a matter for the trier of fact.

Under s 44ZZRH(2) a corporation may be found guilty of an offence against s 44ZZRF or s 4ZZRG even if:

(a) obtaining the benefit is impossible; or

(b) each other party to the contract, arrangement or understanding is a person who is not criminally responsible; or

(c) subject to subs (3), all other parties to the contract, arrangement or understanding have been acquitted of the offence.

Under s 44ZZRH(3) a corporation cannot be found guilty of an offence against s 44ZZRF or s 4ZZRG if:

(a) all other parties to the contract, arrangement or understanding have been acquitted of such an offence; and

43 This is based on the dishonesty test in R v Ghosh [1982] 2 All ER 68. Contrast the “ordinary decent people” formulation in Peters v The Queen (1998) 192 CLR 431 per Toohey and Gaudron JJ. The latter species is rumored to be facing extinction in NSW.

44 Contrast Criminal Code (Cth) s 11.5(3)(a) (a person may be found guilty of conspiracy to commit an offence even if “committing the offence” is impossible).

45 See the similar provision for conspiracy in Criminal Code (Cth) s 11.5(3)(c)(i).

46 See the similar provision for conspiracy in Criminal Code (Cth) s 11.5(4)(a).
6.2 On what grounds is the requirement of dishonesty open to question?

Reliance on the requirement of an “intention dishonestly to obtain a benefit” to differentiate the new cartel offences from civil penalty prohibitions is open to question, on these grounds:

- An “intention dishonestly to obtain a benefit” is not a touchstone of serious harm or serious culpability. “Dishonesty” encompasses very minor as well as very major kinds of fraudulent acquisition. In terms of culpability, “dishonesty” encompasses mere peccadilloes as well as craven, determined, sustained and unrepentant acts of cheating. An intention to derive or obtain a benefit is the quintessence of legitimate commercial activity and the lifeblood of a market economy.

- The idea of making dishonesty an element of a cartel offence reflects the approach taken in the Enterprise Act 2002 (UK), but the explanatory materials on dishonesty as an element of the cartel offence under that Act are seriously flawed.

- The “standards of ordinary people” limb of the element of dishonesty is an undefined and indefinable populist notion the practical application of which will create difficulties for judges and juries as well as for people in business and their advisers. Recent empirical research indicates that even serious cartel conduct may not be regarded as “dishonest” by jurors. Another difficulty is the possibility of moral ambiguity about the wrongfulness as distinct from the legality of price fixing, as in situations where the price fixing has

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47 See the similar provision for conspiracy in Criminal Code (Cth) s 11.5(4)(a).
49 To borrow Ambrose Bierce’s definition of deception, dishonesty is the soul of religion, the essence of commerce, and the bait of courtship: The Devil’s Dictionary (Dover Publications, 1958).
occurred during an economic downturn for the purpose of saving jobs.\textsuperscript{53} Christine Parker interviewed a sample of Australian business executives about their perceptions of the ACCC and its enforcement policy and practice. One interviewee was Robert Wilson, the managing director of Wilson Transformer Company, one of the transformer companies caught up in the transformer company cartel that led to substantial civil penalties against the companies and their senior executives.\textsuperscript{54} What he said when interviewed is an interesting cameo of the motivational complexity that can arise in cartels that, to the uninformed outsider, may seem blatant.\textsuperscript{55}

\textit{Wilson Transformer Company, through Wilson, in fact, cooperated fully with the ACCC from the very day that the ACCC contacted him about the cartels. Yet Wilson had a very different view of the reasons for the breach than the ACCC. For Wilson, the motivations for doing something he knew to be illegal were complex and included patriotism and loyalty to his employees and a business that his father had started, as well as a rational calculation about the benefits versus the costs of doing so. He explained them in an interview:}

\textit{The key reason for us to enter into those arrangements was not to make profits, but for survival and to retain jobs within Australia ... I am very emotionally committed to Australian manufacturing and keeping jobs here ... They [the distribution and power transformer cartels] were both driven by the need to ensure a reasonable base-load for the factories ... At the time I knew I was breaking the law. I knew all the basics of the TPA ... At that time we had gone from an employment high of 350 down to 190. I had been involved in retrenching people and that had involved a lot of pain ... In that time fines were relatively small A$100,000. Fines that small were unquestionably palatable in the context.}

- The requirement for dishonesty of “knowledge that the conduct was dishonest according to the standards of ordinary people” is a subjective test that will allow large and sophisticated corporations to deny liability and quite possibly obtain an acquittal on the basis of subjective beliefs about the morality of their conduct. One of many possibilities is that accused will argue that the price fixed with a competitor was a reasonable price and hence that the conduct was not known to be dishonest according to the standards or ordinary persons.\textsuperscript{56} Clearly such an argument is legally irrelevant under the definition of price fixing in s 45A(1) of the \textit{Trade Practices Act} and s 1 of the \textit{Sherman Act}. In

\textsuperscript{53} \textit{A-G (Cth) v Associated Northern Collieries} (1911) 14 CLR 387 is one classic example.


\textsuperscript{56} Under the Exposure Draft Bill, the requirement of dishonesty relates to the obtaining of a benefit; deception is insufficient.
commenting on a previous version of this paper, Justice Heerey has drawn attention to the jury direction that was upheld by the Court of Appeals for the Ninth Circuit in United States v Alston:

“Under the Sherman Act, price fixing is per se illegal. If you find there was a conspiracy to fix co-payment fees, it does not matter why the fees were fixed or whether they were too high or too low; reasonable or unreasonable; fair or unfair. It is not a defence to price fixing that the defendants may have had good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results.”

His Honour then emphasised that the position would be very different in the context of a cartel offence defined in terms of dishonesty:

“The direction in Alston gives us a useful glimpse into the kind of issues that would inevitably arise in criminal trials for price fixing were a dishonesty element to be introduced. It is hard to argue with the proposition that a person is not dishonestly obtaining a gain if he or she thinks a price (albeit a fixed one) is reasonable and fair. Certainly one would expect defence counsel to put such a proposition to juries. What is a jury to take as reasonable or unreasonable or fair or unfair? Presumably the jury would have to be satisfied beyond reasonable doubt that the defendant did not actually believe that the prices were reasonable or fair and knew that “ordinary people” would not believe them to be reasonable or fair.”

- The subjective limb of the test of dishonesty would also open the way for accused to rely on mistake of law as a way of denying that their conduct was dishonest. Such laxity is highly contentious. If, as a matter of policy, it is thought desirable to allow a defence of ignorance or mistake of law, or reliance on official advice or an expert economist’s opinion, a fundamental issue of policy is whether any such defence should be limited to the new cartel offences rather than being made a general defence in the criminal law. If there are to be such defences, general or special, the defences would need to be defined in accordance with standard definitional form and practice for criminal law defences. Additionally, consideration should be given to the possibility of placing a persuasive burden of proof on the accused and limiting any new defences to a belief based on objectively reasonable grounds.

- Whether or not dishonesty is workable as an element of theft and other offences against property is beside the point. The point is that cartel conduct is a different sphere of conduct with which few jurors will be familiar. Moreover, jurors will be faced with

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58 974 F 2d 1206 (1992) at 1210.
moral ambiguity where, as is inevitable, corporations, executives and their defence counsel put forward denials of dishonesty based on plausible economic or other justifications for the price fixing or other conduct alleged. In comparison, most street thieves and many corporate fraudsters are relatively sitting ducks.

- Extradition typically requires dual criminality and difficulty may possibly arise in trying to meet the requirement of dual criminality requirement where a country adopts the unusual course of defining its cartel offence in terms of dishonesty. Under the dual criminality provisions in the Extradition Act 1988 (Cth), ss 16(2)(a)(ii) and 19(2)(c), the “conduct of the person constituting the extradition offence” under, for example, s 1 of the Sherman Act 1890 (US), may not amount to a cartel offence as defined under the Exposure Draft Bill unless it is clear from the supporting material that the conduct of the person constituting the extradition offence would satisfy the requirement of dishonesty.

- The element of dishonesty is unnecessary given that there are alternative ways of limiting a cartel offence to serious cartel conduct and sufficiently differentiating between criminal conduct and conduct prohibited by a civil penalty prohibition. The many ways in which criminal and civil conduct have been differentiated in the past, and the many ways in which they could be differentiated in the context of the new cartel offences, are discussed in Part 3. The element of an intention to obtain a benefit does not mean that the benefit by a selling cartel must necessarily be at the expense of those to whom they sell or that the

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Recent cases illustrate the difficulties that can arise in complying with the dual criminality requirement under s 16(2)(a)(ii) of the Extradition Act 1988 (Cth): Tervonen v Minister for Justice and Customs (No 2) [2007] FCA 1684; Williams v Minister for Justice and Customs of the Commonwealth of Australia [2007] FCAFC 33. Contrast Riley v Commonwealth (1985) 159 CLR 1 which turned on earlier and different extradition provisions. The difficulty posed by the requirement of dishonesty for the cartel offence under the Enterprise Act 2002 (UK) is more acute given that, in deciding whether there is dual criminality under the particular provisions of the Extradition Act 2003 (UK), the domestic court is limited to what is set out in the foreign indictment, together with any document that the indictment incorporates by express reference, but may not take into account any narrative or explanation tendered by the requesting state: see Edwards v Government of USA [2007] EWHC 1877 (Admin). In that case, doubt was cast on the Divisional Court decision in Norris v The Government of the United States [2007] EWHC 71 on the basis that the latter decision conflicts with the decision of the House of Lords in Dabas v High Court of Justice in Madrid, Spain [2007] 2 AC 31. The decision of the House of Lords in Dabas was not drawn to the attention of the Divisional Court in Norris. The appeal to the House of Lords in Norris’ case was argued in January 2008. Australian extradition laws remain under review: Attorney General’s Department, A New Extradition System: A Review of Australia’s Extradition Laws and Practice (November 2005). The Exposure Draft Bill is not accompanied by any explanatory notes explaining the operation of the definition of the new cartel offences in the context of the Extradition Act and Australia’s extradition treaties and discussing whether or not it is believed that the definition of the new cartel offences may give rise to problems of the kind illustrated by eg Tervonen v Minister for Justice and Customs (No 2) [2007] FCA 1684, Williams v Minister for Justice and Customs of the Commonwealth of Australia [2007] FCAFC 33.
benefit by a buying cartel must be made at the expense of those from whom they buy.\textsuperscript{61} For example, in the context of network arrangements (eg a national football code; a credit card network), pricing provisions are unlikely to be intended to obtain a gain from the persons with whom members of the network deal. It is much more likely that they are intended to enable the network better to compete against rival networks.\textsuperscript{62} Arguably, there should be a requirement of an intention to increase bargaining power at the expense of those with whom the cartel deals, not only for the new cartel offences but also for the new civil penalty prohibitions.

6.3 What justifications are advanced for including dishonesty as an element of the new cartel offences?

The Discussion Paper offers three justifications for including dishonesty as an element of the new cartel offences:

- dishonesty is a well-established principle of “comparable criminal offences” in Australia and is an element of many offences under the \textit{Criminal Code} (Cth);
- there is “international precedent” for making dishonesty an element of the new cartel offences;
- the potential deterrent and educative value of the new cartel offences would be undermined by failing to highlight at the level of statutory definition the particular wrongdoing to be the subject of criminal (as opposed to civil) prohibition.

These attempted justifications lack persuasiveness.

6.3.1 Comparisons need to be properly conceived and articulated

Comparison with other offences under Commonwealth law is misguided and misleading unless the basis for comparison is properly conceived, articulated and then applied in a transparent and cogent way. The comparison should be based on the relevant subject matter of the offences instead of an inarticulate assumption that a cartel offence is somehow an offence of dishonesty or akin to a breach of directors’ duties. The following questions need to be asked. What is the relevant subject matter of the proposed cartel offences and that of various possible other offences with which a comparison may be drawn? What are the implications of the relevant subject matter for the question of whether or not dishonesty should be an element of the cartel offences?


\textsuperscript{62} For further examples see Fisse B, “The Cartel Offence: Dishonesty?” (2005) 35 ABLR 235 at 243.
Some say that a cartel offence is a species of theft. This is true in a sense but the comparison does not capture the essence of a cartel offence. Price fixing and other forms of serious cartel conduct are concerned most fundamentally with unjustified interference with competitive market forces. Although price fixing is often referred to by the ACCC Chairman as “theft”, this analogy is not the one of judicial choice. Rather, in setting penalties in cartel cases, judges often encapsulate the “harm” caused by such conduct in terms that refer to the distortion of or interference with the competitive process. The interference with market forces may, but need not necessarily, result in benefits to cartellists or losses to their victims. The essence is interference with, or subversion of, the competitive process as distinct from acquisition of property or causing a financial or other loss. An intention to obtain a benefit does not go to the heart of the subject matter because the subversion of the competitive process is the core harm and that core harm is inflicted whether or not the subversion happens to result in the obtaining of a benefit or the causing of a loss.

Dishonesty is also incongruent with the core harm addressed by a cartel offence. The concept of dishonesty relates, not to interference with or subversion of market forces, but to a breach of an obligation to act honestly in: (a) one’s dealings with another’s property or information; or (b) in the conduct of a public or corporate office that is subject to a fiduciary duty to act in good faith and not for one’s own interests. From this perspective, requiring an “intention dishonestly to obtain a benefit” is not true to the subject matter of the proposed cartel offences; indeed, it is a category mistake. The category mistake would be more obvious if, true to the element of an “intention dishonestly to obtain a benefit”, the new cartel offences were to be located in Part 7.2 of the Criminal Code (Cth) (“Theft and other property offences”), Part 7.3 of the Criminal Code (Cth) (“Fraudulent conduct”, or Part 2D.1 of the Corporations Act (“Duties and Powers”).

The point made above is supported by comparing offences under Commonwealth law that are concerned with the subject matter of interference with, or subversion of, markets and other systems essential to the effective functioning of the economy or polity:

- Consider the offences under section 1311 of the Corporations Act 2001 (Cth) of market manipulation and market rigging (ss 1041A, 1041B and 1041C), insider trading (s 1043A), and continuous disclosure (ss 674, 675). These offences are all concerned with

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63 Similarly, market manipulation and other offences might be described loosely as involving “fraud on a market”, in the sense relevant under US securities law. However, fraud on a market is very different from dishonesty in the Ghosh sense: it does not require that the conduct was dishonest according to the standards of ordinary people, nor that the defendant knew that the conduct was dishonest according to those standards. See further CAMAC, Discussion Paper, Shareholder Claims against Insolvent Companies: Implications of the Sons of Gwalia Decision (Sept 2007), ch 9.
65 See eg ACCC v McMahon Services Pty Ltd (ACN 008 274 020) (No 1) [2004] FCA 1171 at [76]; ACCC v Leahy Petroleum (No 2) [2005] FCA 254 at [15]; ACCC v Visy Holdings Pty Ltd No 3 [2007] FCA 1617 at [306].
conduct that is likely to distort or subvert the share market.\textsuperscript{66} They are serious offences (they carry a maximum jail term of 5 years). Dishonesty is not a requisite element of any of these offences: their subject matter is not breach of an obligation to act honestly in one’s dealings with another’s property or information or in the conduct of a public or corporate office that is subject to a fiduciary duty to act in good faith and not for one’s own interests. Nor are they defined in terms of an intention to obtain a benefit or to cause a loss.\textsuperscript{67}

- Offences against the administration of justice are further examples of offences that are concerned with the need to guard against interference with, or subversion of, a system of order, in this case the justice system. Accordingly, they are not defined in terms of dishonesty or an intention to obtain a benefit or to cause a loss. A prime example is the offence under section 42 of the \textit{Crimes Act} 1914 (Cth) of conspiracy to obstruct, prevent, pervert, or defeat, the course of justice in relation to the judicial power of the Commonwealth.

- Money laundering offences under Part 10.2 of the \textit{Criminal Code} (Cth) and the offence of “smurfing” under s 31 of the \textit{Financial Transaction Reports Act} 1988 (Cth) relate substantially to the use of the financial system for illegitimate purposes. They are not targeted at unlawful acquisitions of property or breaches of fiduciary or similar obligations. Again, as one would expect, they are not defined in terms of dishonesty or an intention to obtain a benefit or cause a loss.

In our view, it is misleading to suggest that the proposed cartel offences are more closely comparable to theft and offences relating to directors’ duties than they are to offences that relate to interference with, or subversion or distortion of, market mechanisms or institutional systems. To treat cartel offences as falling within the same category as offences of dishonesty is to confuse two very different subject matters. From this perspective, a requirement of an “intention dishonestly to obtain a benefit” is misguided. This is readily apparent from examples of price


\textsuperscript{67} A desperate advocate of dishonesty as an element of the new cartel offences might possibly contend that dishonesty should be an element of insider trading and other offences of market abuse. However, the argument would require a sudden and spectacular transmogrification: the offences in question are long-standing and there is no apparent move to transform them into offences requiring dishonesty. For example, no such suggestion is mentioned in the extensive re-consideration of insider trading in Corporations and Markets Advisory Committee, \textit{Insider Trading Report} (2003). Moreover, given the notorious difficulty of proving liability for such offences currently, adding a requirement of dishonesty would make the offences a dead letter.
fixing where the intention of the colluding competitors is not to obtain a benefit in any substantial sense but where there is nonetheless a serious interference with competitive market forces.

Assume that: (a) competitors A and B fix the price at which they will acquire widgets from C; (b) their intention is to prevent C from making what they believe to be an unjustified margin; (c) if they paid C’s higher asking price they could and would pass on the higher cost to their own customers without losing market share. In this example and, in our view in all cases of price fixing, criminal liability should not require an intention to obtain a benefit or cause a loss: the gravamen of a cartel offence is intentional interference with competitive market forces, not the extraneous motives or ulterior intentions of the colluding competitors. Distortion of market forces through price fixing or other serious cartel conduct may coincide with an intention to obtain a benefit in most cases but it need not do so. Moreover, an intention to obtain a benefit in itself is innocuous – such an intention is genetically imprinted in the rational economic actor and is the widespread object of encouragement and admiration in a market economy.

It might be contended that the new cartel offences, unlikely civil penalty prohibitions against price fixing and exclusionary provisions, should in fact be concerned with the dishonest acquisition of property. However, such a contention would be unconvincing given that the offence of conspiracy to defraud could readily be extended to cover the ground, is simpler for juries to understand, and is a long-standing mainstay of the criminal law.

The decision of the English Divisional Court in Norris v The Government of the United States does not indicate that dishonesty is appropriate as an element of a cartel offence. First, the proceedings in the Norris case are concerned with an extradition request by the US Department of Justice that proceeded on the basis that the conduct in question would amount to the offence of conspiracy to defraud in the UK. The cartel offence under the Enterprise Act 2002 is irrelevant to the proceedings in Norris because the cartel offence did not exist at the time of the relevant conduct (which is why the US Department of Justice framed its extradition request in terms of conspiracy to defraud). Secondly, no one denies that the offence of conspiracy to defraud requires dishonesty nor that what is to be said about the concept of dishonesty in the forthcoming decision of the House of Lords in Norris will be relevant to the interpretation of dishonesty as an element.

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68 The operation and scope of conspiracy to defraud in the context of cartel conduct is discussed in Lever J and Pike J, “Cartel Agreements, Criminal Conspiracy and the Statutory ‘Cartel Offence’” (2005) 26 ECLR 90, 164. The puzzle as to why an offence of dishonest cartel conduct was introduced by the Enterprise Act instead of relying on the offences of conspiracy to defraud is discussed in Joshua J, “Norris v United States: A Stalking Horse for the Cartel Offence”, Competition Law Insight 12 February 2008 11. Conspiracy to defraud at common law requires an intention to create a false impression and thereby to induce victims to act on the basis of that false impression – dishonesty relates to the false impression, not the obtaining of a benefit. The same is true of the cartel offence under s 188(1) of the Enterprise Act 2002 (UK). By contrast, the cartel offences in the Exposure Draft Bill would require an intention dishonestly to obtain a benefit – dishonesty relates to the obtaining of a benefit as well as to the intended mode of acquisition of a benefit. The same is true of conspiracy to defraud under s 135.4 of the Criminal Code (Cth). Note also that conspiracy to defraud under s 135.4 of the Criminal Code (Cth) is limited to situations where the intended victim is a Commonwealth entity – additional provisions would be needed to extend the operation of that offence to price fixing or market sharing where the intended victims are commercial enterprises or individual persons.

of the cartel offence under the \textit{Enterprise Act}. Thirdly, a cartel offence is not conspiracy to defraud but an offence based on a policy decision that the offence of conspiracy to defraud is insufficient to cover the ground – otherwise there would be no need for a separate cartel offence. Fourthly, the ground to be covered by a cartel offence is conduct that does not necessarily amount to a conspiracy to defraud but which involves a patently unjustified interference with the competitive market process.

None of this is to deny that causing, or engaging in conduct likely to cause, significant detriment or loss is a factor that should be taken into account in the decision to refer a case to the CDPP and the decision of the CDPP to prosecute for a cartel offence. In that context, account should also be taken of the extent or likely extent of illegitimate gains, the extent to which the conduct is likely to be regarded as morally wrong or simply unwanted by the community, and the degree of offender culpability. The Draft ACCC-CDPP MOU should be expanded to include these criteria, as discussed in Part 11 below.

\textbf{6.3.2 There is only one international precedent}

The “international precedent” for making “dishonesty” an element of a cartel offence is limited to the United Kingdom. The United Kingdom Office of Fair Trading (“OFT”) has said that it has not experienced difficulty in prosecuting offenders for the dishonesty-based offence under the \textit{Enterprise Act} 2002 (UK). However, that observation hardly justifies the inclusion of dishonesty as an element of a cartel offence given that:

- There have been only three prosecutions by OFT to date.
- The observation in question is made from the standpoint of a prosecution agency that promoted the inclusion of dishonesty as an element of the cartel offence under the \textit{Enterprise Act} 2002 (UK). It does not address the uncertainty that the concept of dishonesty creates for corporations and their advisers.
- No one contends that the element of dishonesty will be difficult for jurors to apply in the most blatant cases of cartel conduct. The relevant question is whether or not dishonesty is capable of differentiating clearly between blatant cases and cases on the boundary between criminal and civil liability and where criminal liability is not warranted. It cannot be assumed that less than blatant cases or cases best left to civil liability will never be

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70 This observation was made at the recent ABA International Cartel Workshop, San Francisco, 31 January – 2 February 2008, by the OFT spokesperson at the enforcer’s roundtable session.
prosecuted. The concept of dishonesty does not clearly delineate the boundary between criminal and civil liability.

In France, there are two cartel offences that require fraud, but jury trial does not apply to those offences. By contrast, dishonesty is not an element of cartel offences in the overwhelming majority of jurisdictions that have criminalised serious cartel conduct. Those jurisdictions include the United States, Canada, Japan and Korea.

The contention in the Discussion Paper that no distinction is made between criminal and civil liability in the definition of cartel conduct in s 1 of the Sherman Act 1890 (US) is literally correct but does not disclose the fact that the fault element required for criminal liability under s 1 is different from and more demanding than that sufficient for civil liability. Section 1 has been interpreted by the United States Supreme Court as requiring a more stringent fault element for the purposes of criminal liability. In US v United States Gypsum Co, the Supreme Court held that criminal liability under s 1 required proof of intention or knowledge of the probable consequences (in the case of price fixing, knowledge of the probability that the arrangement would result in the fixing of prices).

6.3.3 A statutory element of dishonesty is not required to deter and educate

There is no apparent substance in the suggestion in the Discussion Paper that the deterrent and educative value of the new cartel offences is contingent on including dishonesty as a element of the offence. Each of the relevant physical acts involved in the new cartel offences (for example, price-fixing and market division) is inherently morally wrongful because they entail one or more of cheating, deception or stealing (in the fundamental moral rather than technical legal sense). Accordingly, there is no obvious need to superimpose a requirement of dishonesty. Additionally, there are many ways in which the criminality of serious cartel conduct can and should be signaled. They include:

- giving the offence a more appropriate name (e.g. “collusive market subversion”);
- defining the fault elements and physical elements of the offence separately from and more narrowly than the fault elements and physical elements of the civil penalty prohibitions, and making the fault elements explicit in the offences;

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72 Article L 420-6 of the Commercial Code imposes liability on a natural person who “fraudulently takes a personal and decisive part in the conception, organisation or implementation of the practices referred to in Articles L.420-1 and L.420-2”. Article 313-6 of the Penal Code creates a bid-rigging offence: “In a public sale or tendering process, the rejection of a bid or tender, or the restriction of bids or tenders, by gifts, promises, understandings or any other fraudulent means, is punished by six months’ imprisonment and a fine of €22,500.”


• adopting fault-based principles of corporate and individual criminal responsibility rather than vicarious responsibility;

• providing for jail as a sentence for individual offenders; and

• using all the trappings of the criminal process including the need for proof beyond a reasonable doubt, jury trial, and the recording of a conviction if an accused is found liable.
7. THE FAULT ELEMENTS OF THE NEW CARTEL OFFENCES

7.1 Outline of the fault elements of the new cartel offences

The new cartel offences under ss 44ZZRF and 44ZZRG have five main fault elements:

1. The fault element in relation to: (a) the making of a contract or arrangement or the arriving at an understanding; and (b) the giving effect to a cartel provision;

2. The fault element in relation to the purpose/effect condition of the cartel provision;

3. The fault element in relation to the competition condition of the cartel provision;

4. The fault element of intention to obtain a benefit in the requirement that the accused must act with an “intention dishonestly to obtain a benefit”; and

5. The fault element of knowledge in the requirement for dishonesty that the accused must know that the relevant conduct is dishonest according to the standards of ordinary people.75

The Exposure Draft Bill does not define fault elements (1)-(3) explicitly except to the extent that the wording “provision has the purpose” in s 44ZZRD(2) refers to a mental state as distinct from the objective purpose or a provision.

Under s 6AA(1) of the Trade Practices Act 1974 (Cth) the default fault elements under the Criminal Code (Cth) will apply unless excluded. Under the Criminal Code (Cth), an offence consists of physical elements and fault elements. A physical element of an offence may be “conduct”, “a result of conduct” or “a circumstance in which conduct, or a result of conduct, occurs.” The default fault element for conduct is intention. The default fault element for a result of conduct is recklessness. The default fault element for a circumstance is recklessness.

Intention is defined by s 5.2(3) of the Criminal Code (Cth) as follows: “A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.”

Recklessness is defined in s 5.4(2) of the Criminal Code (Cth) with respect to a result as requiring that:

(a) the accused be aware of a substantial risk that the result will occur; and

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75 See further Odgers S, Principles of Federal Criminal Law (Lawbook Co., 2007) at 33-36.
Recklessness is defined in s 5.4(1) of the *Criminal Code* (Cth) in relation to a circumstance as requiring that:

(a) the accused be aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take that risk.

Making a contract or arrangement or arriving at an understanding, or giving effect to a provision, may be characterised as a conduct element rather than as a circumstance.\(^{76}\) If so, intention will be required as to that element.

The cartel offence under s 44ZZRF requires that the CAU “contain a cartel provision” (s 44ZZRF(1(b)). Presumably this element is a circumstance, and requires recklessness as defined in s 5.4(1) of the *Criminal Code*.

The “purpose of a provision” in the definition of the purpose/effect condition in s 44ZZRD(2) could be characterised as a specific fault element (i.e. requiring purpose in the sense of intention).\(^{77}\) However, if “purpose of a provision” is interpreted as meaning the objective purpose of a provision, this element would be characterised as a circumstance and recklessness would be the relevant fault element.

The effect element of the purpose/effect condition required for a cartel provision as defined in s 44ZZRD(2) appears to be a result of conduct. If so, recklessness is the relevant fault element in relation to that element.

The competition condition required for a cartel provision as defined in s 44ZZRD(3) appears to be a circumstance. If so, recklessness is the relevant fault element.

### 7.2 Undue complexity of the fault elements for the new cartel offences?

The combination of complex definition of the physical elements of the new cartel offences and the intricacy of the *Criminal Code* (Cth)’s specification of varying fault elements depending on whether the relevant physical element is to be characterised as conduct, a result of conduct or a circumstance is unwieldy and may prove difficult for trial judges to convey to juries effectively.


\(^{77}\) See *Lee v R* [2007] NSWCCA 71.
7.3 Questionable use of “purpose of a provision” as a definitional element?

The wording “purpose of a provision” is likely to occasion much the same difficulty of interpretation and application as that now occasioned by the use of the same wording in s 45 and s 4D.

The wording was interpreted as requiring a common purpose in *Carlton & United Breweries (NSW) Pty Ltd v Bond Brewing NSW Ltd* (1987) ATPR [40-820] at [48,880]. By contrast, in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (1990) 27 FCR 460 the Full Federal Court took the view that the purpose of a provision could be anti-competitive where only one of the alleged parties had a subjective anti-competitive purpose.78 By further contrast, in *Seven Network Limited v News Limited* [2007] FCA 1062 at [2402] ff, Sackville J adopted the interpretation that the relevant purpose must be shared by “each of the parties responsible for including” the relevant anti-competitive provision in an agreement as distinct from the parties to the alleged agreement. The interpretation adopted in *Seven Network Limited v News Limited* raises the difficulty of determining which parties are to be taken as being “responsible for including” the relevant anti-competitive provision in an agreement.

If the words “purpose of a provision” are taken to mean the purpose of the parties “responsible for including” the alleged cartel provision in a contract, arrangement or understanding, the relevant fault element in relation to this circumstance will be recklessness. This means that the prosecution must prove that the accused was aware of a substantial risk that those particular parties acted with the purpose of bringing about the results specified in s 44ZZRD(2).

It is far from apparent why the reconstruction of the words “purpose of a provision” in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* and *Seven Network Limited v News Limited* should apply to the new cartel offences, especially given that these offences carry the possibility of a jail sentence.

In the context of civil penalty prohibitions, it is difficult to understand why the opportunity has not been taken in the Exposure Draft Bill to replace the wording “purpose of a provision” with a simpler concept such as a requirement that two or more parties acted with a common purpose.79

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78 See the criticism in Robertson D, “The Primacy of Purpose in Competition Law – Pt 1” (2001) 9 CCLJ 4 at [71]-[72].

79 Compare the fault element of conspiracy under the *Criminal Code* (Cth) s 11.5(2)(b); and the competition condition as defined in s 44ZZRD(3) of the Exposure Draft Bill.
7.4  Is “recklessness” too far-reaching a fault element?

The definition of recklessness under Criminal Code (Cth) requires an awareness of a substantial risk and taking an unjustified risk given the circumstances known to the defendant. The definition of the relevant degree of risk is not identical to the degree of risk required by s 44ZZRB in relation to the meaning of “likely” for the purposes of the definition of a cartel provision under s 44ZZRD (“likely” includes a risk that is “possible but not remote”).

The degree of risk of which the accused must be aware for recklessness under the Criminal Code (Cth) is low. By contrast, in US v United States Gypsum Co, the United States Supreme Court held that the offence under s 1 of the Sherman Act 1890 (US) required proof of intention or knowledge of the probable consequences (in the case of price fixing, knowledge of the probability that the arrangement would result in the fixing of prices).

7.5  Alternative possible approaches?

One alternative possible approach to the definition of the fault elements of the new cartel offences would be to require a common intention to achieve one or more of the objects specified as effects in the definition of a cartel provision under s 44ZZRD(2), plus: (a) awareness that the relevant circumstances required for liability are “more likely than not” or “highly likely”; and (b) the existing requirement for recklessness under the Criminal Code (Cth) that the taking of the risk be unjustified.

Sections 188(1) and (2) of the Enterprise Act 2002 (UK) require an intention on the part of each and every accused to achieve the price fixing, bid rigging or other particular form of cartel conduct alleged. In Gerakites v The Queen (1983) 153 CLR 317 the High Court of Australia held that conspiracy at common law requires that all parties to a conspiracy have a mutually shared intention to achieve the object of the conspiracy.

The main advantage of this suggested approach is that it would help to simplify directions to juries on the fault elements of the new cartel offences.

A requirement of a common purpose would also serve as one way of differentiating the cartel offences from civil penalty prohibitions.

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All the fault elements, including the default fault elements that apply by reason of the operation of the *Criminal Code* (Cth), should be stated explicitly in the definition of the new cartel offences.  

Account should be taken of the views expressed by the United States Supreme Court in *US v United States Gypsum Co* as to the suitability or otherwise of intention as the fault element of the offences under s 1 of the *Sherman Act* 1890 (US).  

“The business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits, and risks. A requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator’s knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent.”

These views are open to question, at least in the context of the cartel offences proposed under the Exposure Draft Bill. First, if “intention” is defined to mean that a person “has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events”, as under s 5.2(3) of the *Criminal Code* (Cth), there is no need for proof of a “conscious desire to bring [a result as defined in s 44ZZRD(2)] to fruition.” Secondly, the relevant result as defined in s 44ZZRD(2) is, for example, the fixing, controlling or maintaining of a price, a simpler and much less value-laden concept than an “unreasonable restraint of trade” under s 1 of the *Sherman Act* 1890 (US). Thirdly, there is no suggestion that a requirement of a common intention for the fault element of the new cartel offences would enable an accused to deny liability on the basis of ignorance or mistake of law – see s 9.3 of the *Criminal Code* (Cth).

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8. INDIVIDUAL LIABILITY FOR THE NEW CARTEL OFFENCES AS A PRINCIPAL OFFENDER

8.1 Elements of individual liability for the new cartel offences

By virtue of s 6 (as proposed to be amended) there will be certain limited circumstances in which the new cartel offences and civil penalty prohibitions under the new Division 1 of Part IV will apply to persons other than corporations. Generally otherwise, the Schedule Version of the cartel offences and civil penalty prohibitions will apply to a “person”.

Accordingly, the physical elements required for individual liability as a principal offender are making a contract or arrangement, or arriving at an understanding, that contains a cartel provision, or giving effect to a cartel provision.

The fault elements required for liability for the new cartel offences are as discussed in Part 7.

Section 84(3) imposes vicarious responsibility upon an individual in relation to a state of mind:

(3) If, in:

(a) a prosecution for an offence against s 44ZZRF or s 44ZZRG in respect of conduct engaged in by a person other than a body corporate; or

(b) … ;

it is necessary to establish the state of mind of the person, it is sufficient to show that:

(c) an employee or agent of the person engaged in that conduct; and

(d) the employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and

(e) the employee or agent had that state of mind.

Section 84(4) imposes vicarious responsibility in relation to conduct.

However, under s 84(4A) an individual is not subject to jail where vicarious responsibility is imposed under s 84(3) or (4)):
(4A) If:

(a) a person other than a body corporate is convicted of an offence; and

(b) subs (3) or (4) applied in relation to the conviction on the basis that the person was the person first mentioned in that subsection; and

(c) the person would not have been convicted of the offence if that subsection had not been enacted;

the person is not liable to be punished by imprisonment for that offence.

8.2 Will superior managers in corporations be able to avoid liability for the new cartel offences as a result of the way in which individual liability as a principal offender is defined?

Superior managers in a corporation may not make a contract or arrangement or arrive at an understanding or give effect to a cartel provision themselves. They may authorise or condone such conduct. However, ss 44ZZRF and 44ZZRG do not define liability in terms of authorising, permitting or allowing the making of a contract or arrangement, the arriving at an understanding or the giving effect to a cartel provision.

Superior managers in a corporation will not be employers or principals and hence will not be subject to vicarious responsibility under s 84(3) or (4). Liability will depend on secondary (accessorial) liability as an accomplice or person knowingly concerned in an offence. Liability as a secondary party will require knowledge of all the “essential matters” constituting the principal offence including knowledge that the contract, arrangement or understanding will result in price fixing, or another effect specified as a required effect in the definition of a cartel provision in s 44ZZRD(2). It is questionable why superior managers should be exposed to liability only on the basis of knowledge when the lower-level employees who engage in the conduct of making a contract or arrangement or arriving at an understanding can be held liable on the basis of recklessness as to that conduct resulting in price fixing or another effect defined in s 44ZZRD(2).

Another question is whether or not managerial or other employees will be able to escape liability as principal offenders on the basis that the only parties that are “in competition with each other” within the meaning of s 44ZZRD(3) are their corporate employers. This escape route seems open under the Exposure Draft Bill. Nonetheless, they will be subject to liability on the basic of secondary liability for an offence committed by their corporation (e.g. if they are knowingly concerned in the corporation’s offence – s 79(1)(c)).

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8.3 Should individual employers or principals be subject to vicarious criminal liability for the conduct and/or states of mind of their employees or agents?

Section 84(3) and (4) impose vicarious criminal responsibility but jail is excluded by s 84(4A) where vicarious responsibility is imposed. This approach is consistent with the imposition of vicarious criminal responsibility on individual persons in relation to offences relating to unfair practices under Part VC of the *Trade Practices Act* 1974. Nonetheless, vicarious criminal responsibility is inconsistent with the general principle that criminal responsibility is personal not vicarious.86 The approach taken under the Exposure Draft Bill and the existing ss 83(3)-(4) clashes with the view expressed in the recent report of the Corporations and Markets Advisory Committee that corporate officers should not be subject to criminal liability on a strict or automatic basis and that liability should require participation and fault as an accessory under the general principles of criminal responsibility for complicity.87

The departure from the general principle of criminal responsibility that responsibility is personal, not vicarious, is also inconsistent with the ideal of maintaining a clear and principled differentiation between criminal and civil prohibitions – see Part 3 above.

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9. CORPORATE LIABILITY FOR THE NEW CARTEL OFFENCES AS A PRINCIPAL OFFENDER

9.1 Elements of corporate liability for the new cartel offences

The physical elements of the new cartel offences are making a contract or arrangement, or arriving at an understanding, that contains a cartel provision, or giving effect to a cartel provision.

The fault elements are as described in Part 7.

The fault elements are attributable to a corporation on the basis on vicarious responsibility under s 84(1), which provides:

1. If, in:
   
   a. a prosecution for an offence against s 44ZZRF or 44ZZRG in respect of conduct engaged in by a body corporate; or
   
   b. …;

   it is necessary to establish the state of mind of the body corporate, it is sufficient to show that:

   c. a director, employee or agent of the body corporate engaged in that conduct; and

   d. the director, employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and

   e. the director, employee or agent had that state of mind.

The physical elements are attributable vicariously to a corporation under s 84(2).

The Criminal Code (Cth) provisions on corporate criminal responsibility under Part 2.5 of the Code do not apply: s 6AA(2) of the Exposure Draft Bill.

“Party” is given an extended meaning under s 44ZZRC:

For the purposes of this Division, if a body corporate is a party to a contract, arrangement or understanding (otherwise than because of this section), each body corporate related to that body corporate is taken to be a party to that contract, arrangement or understanding.
9.2 Why have the Criminal Code (Cth) provisions on corporate criminal responsibility not been followed in relation to the fault elements of the new cartel offences?

The main possible options for the attribution of responsibility to corporations for the new cartel offences are:

1. vicarious responsibility under s 84(1) and (2) of the Trade Practices Act 1974 (Cth);

2. corporate responsibility under the Criminal Code (Cth) provisions on corporate criminal responsibility;

3. vicarious responsibility subject to a defence that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct, as under s 44ZZO and s 152EO of the Trade Practices Act 1974 (Cth).

Option (1), as adopted under the Exposure Draft Bill, has given the ACCC a low barrier to clear when seeking to establish liability for civil penalties and remedies in the past. However, vicarious liability is a form of strict liability and is inconsistent with the general principle that criminal responsibility is personal, not vicarious, and requires fault (see Part 8.2.2 above).

Option (2) follows the general principle of corporate responsibility under s 12.3 of the Criminal Code (Cth) that seeks to reflect the concept of corporate blameworthiness by requiring fault that is corporate in nature rather than merely fault on the part of “a directing mind” under the principle in Tesco Supermarkets Ltd v Nattrass. The Criminal Code (Cth) provisions depart from the Tesco principle in two main ways:

- The physical elements of an offence are attributable to a corporation on a much broader basis than under the directing mind principle. It is unnecessary to prove that a representative who is directing mind of the corporation engaged in the relevant conduct. It is sufficient that the conduct is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority (s 12.2).

The fault element of an offence is attributable to a corporation on a different basis than under the directing mind principle. Under s 12.3(1), if intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element is attributable to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence. Section 12.3(2) provides that this corporate fault element can be established by:

(a) proving that the body corporate’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence (corporate responsibility on this basis does not apply if the body corporate proves that it “exercised due diligence to prevent the conduct, or the authorisation or permission”); or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

The Criminal Code (Cth) provisions would raise a considerable barrier for the prosecution in the context of cartel conduct:

- Rare will be the case where a board gets involved in cartel conduct or fails to have boilerplate precautions in place to thwart attempts to sheet home criminal responsibility.

- The concept of a ‘high managerial agent’ is ill-defined but goes further than the Tesco precept of “a directing mind”. Even so, cartel offences are often likely to be remote command posts of high managers.

- The concept of a “corporate culture” does project the animating idea of corporate blameworthiness. However, the concept has yet to be tested and appears to require proof of conditions and attitudes within an organisation that go considerably beyond merely proving that the managers immediately involved in the cartel conduct acted with criminal

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89 Under s 12.3(6), ‘high managerial agent’ means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy. Contrast the avoidance of this concept in the statutory model set out in Fisse B, “The Attribution of Criminal Liability to Corporations” (1991) 13 Sydney Law Review 277.
intent. Moreover, expert sociological evidence would seem relevant to prove or disprove the existence of a corporate culture. Given that usually there are many diverse cultures within a corporation, the concept of some homogenous corporate culture is probably unworkable.\textsuperscript{90}

The prosecution would face much less of a hurdle under option (3). Under option (3), vicarious responsibility would be imposed on a corporation subject to a defence that the corporation took reasonable precautions and exercised due diligence to avoid the conduct. This is the pragmatic approach adopted in s 44ZZO and s 152EO of the \textit{Trade Practices Act} 1974 (Cth) and in provisions governing corporate criminal responsibility in numerous Acts of the Commonwealth of Australia.\textsuperscript{91}

On the other hand, the \textit{Corporations Act} 2001 (Cth) and numerous other major Commonwealth statutes do apply the principles of corporate fault under Part 2.5 of the \textit{Criminal Code} (Cth) rather than merely providing for a defence of corporate reasonable precautions.

\textbf{9.3 Why extend criminal liability to related corporations as parties to a contract, arrangement or understanding rather than on the basis of secondary liability under s 79?}

The provision in s 44ZZRC that deems a related corporation to be a party to a contract, arrangement or understanding entered into by another related corporation is potentially far-reaching.

Unlike liability for being knowingly concerned in an offence under s 79(1)(c), liability for a new cartel offence will not require proof that the accused related corporation was concerned in and had a “practical connection” with the offence. Nor will liability for the new cartel offence under s 44ZZRF require knowledge by the accused related corporation that a CAU entered into by a subsidiary contains a cartel provision:\textsuperscript{92} recklessness will be sufficient in relation to that circumstance and recklessness as defined in s 5.4(1) of the \textit{Criminal Code} requires merely the

\textsuperscript{90} See the useful critique in Smircich L, “Concepts of Culture and Organizational Analysis” (1983) 28 \textit{Administrative Science Quarterly} 339.

\textsuperscript{91} As at 14 February 2008, our research indicates that a defence of reasonable corporate precautions is available under well over 40 Commonwealth statutes. See eg, \textit{Banking Act} 1959 (Cth) s 69C; \textit{Financial Transactions Reports Act} 1988 (Cth) s 34; \textit{Privacy Act} 1988 (Cth) s 99A; \textit{Life Insurance Act} 1995 (Cth) s 250; \textit{Petroleum Excise (Prices) Act} 1987 (Cth) s 11; \textit{Weapons of Mass Destruction (Prevention of Proliferation) Act} 1995 (Cth) s 15.

\textsuperscript{92} If criminal liability were to be limited to liability as a secondary party under s 79 of the \textit{Trade Practices Act} 1974 (Cth) a related corporation would be liable only if it had knowledge of the “essential matters” constituting the principal offence, as distinct from merely recklessness as to those matters. See \textit{Giorgianni v R} (1985) 156 CLR 473; \textit{Yorke v Lucas} (1985) 158 CLR 661; \textit{Rural Press Ltd v Australian Competition and Consumer Commission} (2003) 216 CLR 53; Fisse B, "Complicity in Regulatory Offences" (1968) 6 \textit{MULR} 278.
accused be “aware of a substantial risk that the circumstance exists or will exist” and “having regard to the circumstances known to him or her, it is unjustifiable to take that risk.”
10. EXEMPTIONS AND DEFENCES

10.1 Exemptions and defences under the Exposure Draft Bill

The Exposure Draft Bill provides for these exemptions:

- Section 44ZZRL exempts conduct notified under the collective bargaining notice procedure under Part VII Division 2, Subdivision B of the *Trade Practices Act 1974* (Cth) – this exemption applies to ss 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK.

- Section 44ZZRM exempts a cartel provision that is subject to a grant of authorisation – this exemption applies to ss 44ZZRF and 44ZZRJ.

- Section 44ZZRN exempts contracts, arrangements or understandings between related bodies corporate – this exemption applies to ss 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK.

- Section 44ZZRO exempts a cartel provision for the purposes of an unincorporated joint venture if the accused establishes that the provision did not have the purpose, effect or likely effect of substantially lessening competition in any market – this exemption applies to ss 44ZZRJ and 44ZZRK but not to s 44ZZRF or s 44ZZRG.

The Exposure Draft Bill contains other changes relating to exemptions and defences:

- Section 76D is deleted (whereas s 76C continues to apply to exclusionary arrangements prohibited under s 45).

- There is no equivalent to the exemptions under s 45(5)(6) or (7) in ss 44ZZRF, 44ZZRG, 44ZZRJ or 44ZZRK.

- There is no equivalent to the collective acquisition and joint advertising exemptions under s 45A(4), which is deleted.

10.2 Why is there no joint venture defence to the new cartel offences?

Section 44ZZRO provides for a joint venture defence akin to (but not identical with) the joint venture defences under ss 76C and 76D. However, the s 44ZZRO defence applies only to the civil penalty prohibitions under ss 44ZZRJ and 44ZZRK – it does not apply to the new cartel offences under ss 44ZZRF and 44ZZRG.

This is a highly controversial feature of the Exposure Draft Bill.
First, the failure to include a joint defence parallel to that provided for in ss 76C and 76D is impossible to reconcile with the former Treasurer’s Press Release where it is stated that:

“Further amendments to the Trade Practices Act 1974 (Cth) will flow from the Dawson Review recommendations relating to joint ventures and the report of the Intellectual Property and Competition Review Committee. These amendments may permit certain types of conduct where it does not substantially lessen competition.

Legitimate joint ventures and intellectual property arrangements will not be penalised under the cartel offence and will only be penalised under the revised per se civil prohibitions where they substantially lessen competition.”

Secondly, the rationale behind s 44ZZRO may be that legitimate joint ventures will not involve an intention dishonestly to obtain a benefit and hence will fall outside the scope of the new cartel offences. However, the concept of an intention dishonestly to obtain a benefit is ill-defined and its application will depend on whatever content juries happen to give to it. By contrast, the test of liability under a defence based on s 76C or s 76D is relatively well defined and far more conducive to promoting certainty in commercial arrangements.

Thirdly, the thinking behind s 44ZZRO may be that the competition test under the s 44ZZRO defence is unsuitable for determination by a jury. However, if the aim is to preclude jury consideration of the competition effects of joint ventures, that aim would be forlorn. As part of a denial that an accused acted with an intention dishonestly to obtain a benefit, defence counsel will introduce evidence of the reasons why an accused used a joint venture and why the use of that joint venture was believed by the accused to be pro-competitive. It may be noted that denial of an intention to dishonestly obtain a benefit does not impose a persuasive burden of proof on an accused – the prosecution must prove its case beyond a reasonable doubt. By contrast, the joint venture defence under s 44ZZRO imposes a persuasive burden on an accused to establish that the cartel provision did not have the purpose, effect or likely effect of substantially lessening competition in a market.


10.3 Why is the joint venture defence under s 44ZZRO limited to unincorporated joint ventures?

Section 44ZZRO provides:

(1) This section applies to a proceeding for a contravention of s 44ZZRJ or 44ZZRK in relation to a contract, arrangement or understanding containing a cartel provision.

(2) In the proceeding, it is a defence if the defendant proves that:

(a) the parties to the contract, arrangement or understanding are, or will be, carrying on a joint venture covered by subparagraph 4J(a)(i); and

(b) the cartel provision is for the purposes of the joint venture; and

(c) the cartel provision does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition.

Contrast s 76C and 76D, which apply respectively to an exclusionary provision and a price fixing, provision that is “for the purposes of a joint venture” (emphasis added). The defences under s 76C and s 76D apply in relation to incorporated joint ventures as defined in s 4J(a)(ii) as well as to unincorporated joint ventures as defined in s 4J(a)(i). The non-inclusion of incorporated joint ventures under the joint venture defence in s 44ZZRO is not explained and lacks any apparent justification.

10.4 Why are there no exemptions for collective acquisition and joint advertising?

The exemptions under s 45A(4) for collective acquisition and joint advertising are deleted under the Exposure Draft Bill. No justification is given. None is apparent.

10.5 Why is there no exemption corresponding to that under s 45(6)?

The Exposure Draft Bill does not provide for any exemption corresponding to that under s 45(6).

In many vertical supply situations A, a supplier, will compete downstream with B, a customer. Re-supply situations are covered by the definition of a cartel provision in s 44ZZRD(2) but there is no provision equivalent to s 45(6). No justification is given for this radical change in the law. None is apparent (see Part 5.3.1C).
10.6 Why are there no exemptions corresponding to those under s 45(5)(7)?

The Exposure Draft Bill does not provide for any exemption corresponding to those under ss 45(5) and (7). Again, no justification is given for this change and none is apparent.
11. THE PROPOSED ENFORCEMENT POLICY, AGENCY ROLES AND CRITERIA TO GUIDE INVESTIGATORY AND PROSECUTORIAL DECISION-MAKING

The Draft MOU sets out the policy for enforcement of the new cartel offences, describes the roles of and relationship between the ACCC and CDPP and identifies criteria to guide decisions to investigate, refer for prosecution and prosecute by these agencies. It also deals with the immunity policy (see Part 13 below) and related criminal and civil proceedings (see Part 16 below).

11.1 Enforcement policy

The Draft MOU states that “criminal investigations and prosecutions will be targeted at serious cartel conduct and relatively minor conduct will ordinarily be pursued civilly” (Draft MOU, [1.2]). The criteria to be applied in relation to the decisions to investigate and prosecute flesh out, to some extent, what is meant by “serious” as opposed to “relatively minor.” These criteria, discussed below, relate primarily to the economic harmfulness or potential harmfulness of the conduct.

Thus, the policy in relation to enforcement of the cartel offences is evidently that these offences should be directed at cartels that have caused or have the potential to cause serious economic harm. There is a disconnect between this and the approach taken under the Exposure Draft Bill which seeks to differentiate between the criminal and civil prohibitions on the grounds of dishonesty, an indicator of culpability or even moral wrongfulness. That the Draft MOU itself does not mention dishonesty lends further support to the argument that this concept is unnecessary and problematic as a mechanism for differentiation (see Part 6).

Putting dishonesty aside, the ACCC should develop its enforcement policy beyond the contents of the Draft MOU, making adjustments to its current policy under the exclusively civil regime to reflect the addition of criminal sanctions to the regulatory mix. Indeed, an enforcement policy should be part of a broader integrated compliance strategy aimed at encouraging compliance with the Trade Practices Act 1974 (Cth) by making full use of all available and appropriate means. In its 2002 report on Principled Regulation, the ALRC recommended that such an enforcement policy cover: the types of action available to the regulator; the principles behind each of these

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actions; the criteria involved in decisions to pursue one or more such actions; and the regulator’s relationship with other regulators and enforcement agencies. The ALRC recommended further that regulators supplement their external published policy with internal guidelines to provide guidance to staff undertaking enforcement activities.

The brief statements made in relation to compliance objectives and priorities on the ACCC website, in its corporate plan and in speeches by the Chairman fall considerably short of what appears to have been contemplated by the ALRC. The ACCC’s general regulatory philosophy and its approach to and priorities in enforcement were said by the ALRC to be set out in an ACCC document entitled *Making Markets Work – Directions and Priorities* (1999). Not only is this publication now out-of-date, but it is a fairly high level document and, in terms of enforcement policy, did not differentiate between the various forms of anticompetitive conduct prohibited by Part IV.

In the absence of the type of document referred to by the ALRC, there are few objective criteria against which to assess the ACCC’s current enforcement policy in relation to cartels and its implications in light of the forthcoming criminal regime. One such criterion might be the number of cartel cases initiated by the ACCC in recent years. From a review of ACCC media releases announcing proceedings launched in cartel cases, it appears that only 6 such cases have been commenced in the last 4 years (2004-2007). This is difficult to reconcile with statements by the


ACCC Chairman in early 2005 that the ACCC then had “in excess of 20 to 30 more investigations that are serious investigations into cartel behaviour” under way and with reports that the revision of the ACCC’s immunity policy in the same year had generated a “flood” of immunity applications.

Another criterion against which to assess ACCC enforcement policy is the level of penalties imposed, given that a large proportion of penalties are negotiated between the Commission and respondents and are then approved by the Court. An analysis of the penalties imposed in s 45 cases since 1994, depicted as a 4 year rolling average, shows that in the last four years (2004-2007) there has been a decline in corporate penalty levels (see Annexure). The analysis shows, for example, that the mean corporate penalty (in 2007 dollars) was $3,558,016 for the four year period 2000-2003, whereas it was $2,189,102 for the four period 2004-2007. The decline is more marked when the penalties in the recent Visy case, referred to below, are excluded. This would see the mean for the later period fall to $1,423,145. There has also been a significant decrease in the median corporate penalty, the median being a better indication of the distribution of penalties given that it is not as affected by extreme values in the sample. Thus, for the four period 2000-2003 the median corporate penalty (in 2007 dollars) was $2,400,612, whereas for 2004-2007, it was $325,276 ($225,000, excluding Visy).

In interpreting these results it is necessary to bear in mind that the penalties imposed in any given period may not reflect current policies of the ACCC in relation to enforcement and also will not reflect cases in the pipeline (ie under investigation but proceedings not yet commenced, or proceedings commenced but not yet determined). Such caveats aside, the drop off in penalty levels in recent years does not sit comfortably with the tough talk of the current ACCC leadership in connection with “cracking cartels.”

The results in the Visy proceeding are a case in point. As has been argued elsewhere, albeit more than double the highest penalties previously imposed, there are still good reasons to regard the Visy penalties as too low. A total sum of $36 million was imposed for 37 contraventions, that is just under $1 million for each contravention – approximately 10% of the statutory maximum ($10 million), for what was described by Heerey J as “by far the most serious cartel case” in Australian trade practices history. The fact that the ACCC failed to negotiate a separate pecuniary penalty against Richard Pratt is also troubled in

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107 Australian Competition & Consumer Commission v Visy Industries Holdings Pty Ltd (No 3) [2007] FCA 1617 at [320].
that it lacked meaningful precedent, in turn set a dangerous precedent and was flawed in law and as a matter of principle.108

The surprisingly low number of cases initiated (low, that is, relative to the number of cartel investigations reportedly undertaken) and the decline in penalty outcomes in recent years may have various explanations, each of which would have implications for enforcement of the criminal regime. One may be that the ACCC’s high profile campaign against cartels has prompted colluders to become savvier in their efforts to conceal their collusion thereby hindering efforts at detection, investigation and prosecution. Another, related explanation may be that the ACCC lacks the powers to fully investigate and/or litigate cartel cases through to the point of judgment. It may also be that the ACCC does not have the resources for this purpose, or perhaps has underestimated the level of resources required to fulfil the cartel-busting mission that it has set for itself. Alternatively, there may simply be a preference at senior levels of the ACCC for negotiated rather than litigated outcomes, and for settling for lower penalties rather than taking the risk of being forced into a fully contested trial.109

If there is substance in any of these suggested explanations, the implications for the ACCC’s enforcement policy, powers and resources in the context of a criminal regime require careful consideration. In terms of enforcement policy, for example, it is important that the ACCC consider how its apparent penchant for negotiated outcomes will fare in dealings with the CDPP given that this increasingly common feature of regulatory enforcement is inimical to the culture and practices of the CDPP.110 The Draft MOU makes no reference of how negotiated settlements might intersect with referrals to the CDPP. The question of resources is canvassed in Part 11.2 below, and powers in Part 12.

11.2 Roles of and relationship between ACCC and CDPP

The Draft MOU aims to articulate and differentiate between the roles of the ACCC and CDPP in relation to enforcement of the new cartel offences. However, it also recognises that “close cooperation and consultation is required to achieve efficient and effective outcomes” (Draft MOU, [2.1]).

It is indicated that the CDPP will be responsible for:

109 See, eg, Drummond, M, “Fewer ACCC court cases raises concerns”, Australian Financial Review, 31 January 2008, 10 quoting Graeme Samuel: “There’s been a major cultural change in enforcements”, in response to an overall decrease in the number of cases brought and an increase in the use of s 87B undertakings, particularly in the consumer protection area.
prosecution of the offences in accordance with the *Prosecution Policy of the Commonwealth* (“PPC”);¹¹¹

seeking associated remedies (which would include related civil orders: s 44ZZRI), including under the *Proceeds of Crime Acts* 1987, 1992 (Cth)¹¹² (Draft MOU, [2.2]).

While the ACCC will be responsible for:

- investigating cartel conduct and gathering evidence;
- managing the immunity process, in consultation with the CDPP (discussed in Part 13); and
- referral of serious cartel conduct to the CDPP for consideration for prosecution (Draft MOU, [2.3])

In terms of managing the relationship between the ACCC and the CDPP, three layers of liaison appear to be contemplated (Draft MOU, [8]):

- at the level of individual cases, case officers;
- at the level of regular ongoing review of all cases; organisational relationship managers – these persons have not been identified in the Draft MOU;
- at the level of oversight of the general working relationship between agencies and resolution of disputes not able to be resolved below, the CDPP and the ACCC Chairman.

It is not clear whether an officer from each of the ACCC and CDPP will be appointed to each case and at what point in the process of investigation, consultation and referral this will be done. However, it does appear that the “case-team” model adopted in the United Kingdom by the OFT (the regulator) and the Serious Fraud Office (“SFO”) (the prosecuting agency),¹¹³ has been rejected in Australia. Rather, the preference seems to be to retain as much as possible the independence and distinctive roles of each agency while providing for consultation at early stages

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¹¹² The definition of “serious offence” in s 338 of the *Proceeds of Crime Act* 2002 (Cth) is to be amended by adding para (ed) to include the new cartel offences (see Schedule 1, item 1 of the Exposure Draft Bill). For a discussion of the significance of this, see Fisse B, “The Australian Cartel Criminalisation Proposals: An Overview and Critique” (2007) 4(1) *Competition Law Review* 1.

and then on an ongoing basis throughout the enforcement process. Whether this model proves effective remains to be seen.

The relationship between the CDPP and the Australian Securities & Investments Commission (“ASIC”), based on the same model, reportedly has had its difficulties. No doubt, a significant part of the challenge in managing such relationships arises from the different cultures, priorities and perspectives of the two organisations, as evidenced by their traditionally differing approaches to the issue of immunity (see Part 13 below) and the appropriateness of negotiated outcomes, and from the lack of content-specific expertise in each other’s domain (the ACCC in crime and the CDPP in competition law). The latter is particularly true of ACCC expertise in relation to criminal investigations (which will be critical in light of the criminal standard of proof: a major differentiator between the criminal and civil regimes (see Part 3.2.1)).

Given this, it is predicted that the success of the future ACCC/CDPP relationship (on which the success of the new enforcement regime will rely) will depend on the co-development of detailed procedures for handling each stage in the process consistent with the broad terms of the Draft MOU and on training of staff in relation to these procedures (as to which, see Part 11.2). The maturity and interpersonal skills with which individual relationships are handled and inevitable disagreements are resolved at each of the levels identified above will be crucial also.

The roles proposed in the Draft MOU also have resourcing implications for the ACCC. This raises two questions. First, there is the question as to whether the ACCC will be given sufficient funding to properly resource its criminal enforcement and cartel branch. A funding package for the agencies involved in implementing the new criminal regime in Australia was announced in May 2006. The package included AU $18.2 million over four years for legal expenses for the ACCC and

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117 Note in this regard the comments of Justice Heerey regarding the difficulties likely to arise in making decisions about which cases to prosecute and his observations that such problems “cannot be solved in advance by memoranda of understanding, however comprehensive.” See Justice Heerey, “Commentary on Paper of Brent Fisse and Caron Beaton-Wells”, Seminar on Criminalising Cartel Conduct: Issues of Law and Policy, University of Melbourne, 25 February 2008 (copy on file with authors).


119 The funding for the criminalisation proposal was described as “ongoing”. See http://treasurer.gov.au/tsr/content/pressreleases/2006/033.asp?pf+1 viewed 20 August 2007.
AU $7.2 million to support investigations and enforcement. It further included AU $4.4 million over four years for the DPP for cartel prosecutions and AU $3.9 million for the Federal Court to hear cartel trials. Leading practitioners have described these figures as inadequate to fund major cartel prosecutions against the powerful, often internationally supported, deep-pocketed interests behind serious cartel activity.\(^{120}\)

Secondly, there is the question as to whether ACCC staff involved in criminal cartel investigations will have the necessary skills for this task. The ACCC has been said to be providing its staff with extensive training (including by the Australian Federal Police (“AFP”)) since the announcement was made in the Treasurer’s Press Release in 2005, in readiness for the introduction of the criminal regime.\(^{121}\) Such training and other modes of staff support will be crucial to assist staff in developing criminal investigatory skills and in making the transition to working on cases where the people under investigation will be subject potentially to criminal sanctions.\(^{122}\) It is interesting to note in this regard that from April 2008 the Cartels Group of the United Kingdom OFT will take the lead in criminal investigations in consumer protection matters. Given that there are likely to be only a small number of criminal cartel cases each year, this is a deliberate move to provide the OFT cartel staff with an opportunity to develop criminal enforcement capacity and skills and to remain “match-fit.”\(^{123}\)

### 11.3 ACCC decision to investigate

The Draft MOU states the well-known fact that cartels are high on the ACCC’s enforcement agenda (Draft MOU, [3.1]).\(^{124}\) This has been the case at least since the appointment of the current Chairman\(^ {125}\) if not previously (bearing in mind that it was his predecessor who launched the campaign for criminalisation in 2001).\(^ {126}\) What has changed is that with the introduction of

120 Editorial, ‘Funding to fight cartels “inadequate”’, *Australian Financial Review* (Sydney), 11 May 2006, 12. Even more recently, Professor Bob Baxt has called on the new government to ensure that the ACCC is properly funded to fulfil its responsibilities under the proposed criminal regime, and to ensure that the senior positions in the Commission, left vacant under the former government, are filled. These comments were made by Professor Baxt in a speech at a seminar on “Criminalising Cartel Conduct: Issues of Law and Policy”, held at the University of Melbourne, 25 February 2008.


criminal penalties, as indicated in the Draft MOU, in conducting any cartel investigation the ACCC now will have regard to whether the conduct “is such that it would warrant referral to the CDPP if evidence sufficient to found a prosecution were obtained” (Draft MOU, [3.3]).

This question presumably would be considered very early on in an investigation given that the possibility of referral and, down the track, prosecution would influence the approach taken to the types and handling of evidence and methods of investigation (see Part 12). Further, even if at this early stage, the case is not identified as potentially ‘criminal’, the Draft MOU indicates that the question of referral will be kept under review as investigations proceed (Draft MOU, [3.4]).

It is one thing to say that the ACCC will look at every cartel investigation and consider whether it might be appropriate for referral. However, it is another to identify at what point or by what process or trigger an investigation may become a criminal investigation. The Draft MOU appears to gloss over the latter. One option to fix this is for the Draft MOU to state that, at the earliest possible point in a cartel investigation, the ACCC will form a view, perhaps upon what has been referred to in other contexts as a “quick look”, as to whether the referral factors (listed in Draft MOU, [4.3], discussed below) are satisfied or likely to be satisfied in relation to the conduct under investigation. If so, the ACCC should then take a closer look and at this point also, consult the CDPP on whether the investigation should become a criminal investigation.127

The Treasurer’s Press Release indicated that the ACCC would publish guidelines, in consultation with the CDPP, setting out the factors that will inform decisions as to whether or not to pursue a criminal investigation.128 Presumably it is still proposed for this to be done.129 The ACCC’s Submission to the Dawson Committee set out the types of matters that are likely to be included in such guidelines.130


11.4 ACCC referral to CDPP

According to the Draft MOU, the ACCC will consult the CDPP when considering referral of a matter to the CDPP and the CDPP will provide preliminary advice as to whether the matter should be pursued with a view to possible criminal proceedings (Draft MOU, [4.1]). The trigger for this consultation has been referred to above.

As an attempt to reflect the general approach that the ACCC will take to referral, Draft MOU [4.2] is poorly worded and largely uninformative. It states that the factors that the ACCC will consider “are related to the ACCC’s assessment of how such conduct can be best addressed to achieve general and specific compliance.” The meaning of this is unclear. It may be an attempt to refer to a more general enforcement policy by the ACCC. As stated above, such a policy needs to be developed (or revised, as the case may be) and published. The Draft MOU could then sensibly indicate that referral decisions will be informed or guided by that policy.

The Draft MOU further states, as it should, that the ACCC will have regard also to the “factors to which the DPP has regard in considering whether to prosecute” [Draft MOU, 4.2]. These factors are enumerated in Draft MOU [5.2]. The Draft MOU should add that the ACCC will have regard to the PPC.\textsuperscript{131} In reality, as previously stated, the challenge will lie in reconciling the differences in priorities and objectives in the ACCC’s enforcement policy and the PPC.\textsuperscript{132}

The specific considerations to which the ACCC will have regard in deciding whether to refer a matter to the CDPP are listed in [4.3] as whether:

- the conduct was longstanding or had, or could have, a significant impact on the market in which the conduct occurred; or

- the conduct caused, or could cause, significant detriment to the public, or a class thereof, or caused, or could cause, significant loss or damage to one or more customers of the alleged participants; or

- one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct either criminal or civil;


the value of the affected commerce would exceed $1 million within a 12 month period (that is, where the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed $1 million within a 12 month period); or

in the case of bid rigging, the value of the bid or series of bids exceeded $1 million within a 12 month period.

The $1 million threshold consideration has the potential to be both under-inclusive and over-inclusive, depending on the size of the relevant market. Three options for addressing this concern are:

- remove any threshold factors relating the value of affected commerce altogether (taking the United States approach, for example, where the relevant criteria guiding decisions to pursue a criminal investigate simply refer to the “volume of commerce affected” and the “geographic size of the area affected”, amongst others);

- replace the proposed threshold with one that is likely to be a more effective measure of the seriousness of the case in question (for example, framed as a minimum percentage (say 20%, as under the United States Sentencing Guidelines) of the combined value of all sales by all competitors who competed over the relevant period in the specific line of commerce in the relevant geographic market affected by the cartel); or

- retain the current threshold but make it explicit that this is a starting point only in identifying a case as one that may be found suitable for referral, and perhaps adopting the wording used by the SFO in the United Kingdom that it is intended to serve as “an objective and recognisable signpost of seriousness rather than a main indicator of suitability.”

Another, albeit related, question is, if a threshold test of harmfulness is to be retained, whether it should made a jurisdictional element of the offence. For those wary of the reliability of prosecutorial discretion, it may be seen as preferable to leave it to the courts to determine whether criminal jurisdiction should be invoked based on an assessment of whether the cartel in question breaches a specified harm threshold. There is precedent for this – in the case of money


laundering offences, for example.\textsuperscript{138} By comparison, there are those who argue that cartel conduct is ‘serious’, by definition, and that ‘the proportionate response to criminal conduct is to apply a criminal penalty.’\textsuperscript{139} It should follow, so the argument proceeds, that the degree of harm inflicted by the unlawful conduct is reflected in sentencing as distinct from a matter relied on for determining whether to pursue criminal prosecution in the first place. A further alternative is to ensure that a percentage of the volume of commerce affected is incorporated formally into the sentencing process, as it is in the United States and Europe.\textsuperscript{140}

Under the Draft MOU, if the threshold criterion is met, it appears that any one of the three considerations listed in [4.3] may be sufficient to qualify the matter for referral. Two of these relate to the actual or potential harmfulness of the conduct (either by way of impact on the market as a whole or by way of causing detriment or loss to the public or one or more customers of the cartel participants). Loss to suppliers should also be included. While it is unrealistic and undesirable to require that these considerations be more specifically framed, the descriptors used (“longstanding”, “significant impact”, “significant detriment”, etc) highlight the extent of the discretionary judgment involved in such decisions. Such judgments are unlikely to be subject to judicial review given the long-standing respect paid by courts to administrative decision-making in the realms of law enforcement and prosecution.\textsuperscript{141} That said, looking to the future, as a matter of good policy and administration, there should at least be some form of ex post assessment made of how the criteria have been applied in practice.\textsuperscript{142}

The third relates to whether there is any evidence of recidivism by one or more the alleged participants. It is not clear why other culpability factors have been excluded. In an attachment to a second submission to the Dawson Committee by the ACCC, entitled “Outline of Proposed Memorandum of Understanding between the Director of Public Prosecutions and the Australian Competition and Consumer Commission”, some such additional criteria were identified as follows:

- Is the alleged contravention a blatant disregard of the law?
- Did the participants attempt to keep the conduct secret or to enforce participation?

\textsuperscript{138} Under the Criminal Code (Cth) s 400.3, a definitional requirement of the money laundering offence is that the value of the relevant money or property is $1 million or more.


Is there evidence that those involved thought the conduct was dishonest?

Do the participants have a history of involvement in cartels?

Is there clear evidence that the defendants were not aware of or did not appreciate the consequences of their conduct?

Is there evidence that the participants knew that their conduct was illegal but decided to proceed to engage in that conduct?

Is there any evidence of coercion?\(^{143}\)

It is not known why these or related factors were not excluded from the Draft MOU that has been released. The ACCC almost certainly will have regard to such matters in deciding whether to refer a case to the CDPP and the Draft MOU should reflect this.\(^{144}\)

### 11.5 CDPP decision to prosecute

The CDPP is responsible for the majority of prosecutions under federal criminal law. It does not carry out investigations. This is done by the AFP or other law enforcement agencies – in this case, the ACCC. The Draft MOU states that upon formal referral of a matter by the ACCC, the CDPP will, as soon as reasonably possible, advise the ACCC whether in accordance with the PPC\(^{145}\) a prosecution should be commenced (Draft MOU, [5.1]). A formal referral will have to comply with the Guidelines for departments and agencies on submitting briefs to the DPP or as otherwise agreed with the CDPP and the CDPP may request the ACCC to undertake further investigation (Draft MOU, [4.5]).

Decisions by the CDPP to initiate criminal proceedings are made in accordance with the PPC,\(^{146}\) which expressly states that the prosecution of suspected criminal offences should not be automatic (PPC, [2.1]) and that rather, the decision whether to prosecute is regarded as the most important step in the process (PPC, [2.2]). The criteria governing the decision to prosecute have been summarised by the ALRC as including:

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\(^{143}\) The submission was not made public and the status of this attachment is unclear. Both documents were released to Brent Fisse in response to a request for access under the Freedom of Information Act 1982 (Cth).


• the public interest in pursuing a prosecution (including the interests of the victim, the suspected offender and the community at large);

• maintaining the confidence of the community in the criminal justice system;

• fairness (but not weakness) and consistency (but not rigidity);

• the need to tailor general principles to individual cases;

• the effective use of finite resources;

• the availability of admissible, substantial and reliable evidence;

• whether there is a reasonable prospect of conviction and the likely strength of the prosecution’s case in court; and

• the risk of prosecuting an innocent person.\textsuperscript{147}

The PCC provides a detailed list of questions to be considered when evaluating the quality of the evidence ([2.7]). It also lists the factors to be considered in determining whether the public interest requires a prosecution, and states that the factors should be applied and weighted according to the particular circumstances of each case (PPC, [2.10]). Factors relevant to the public interest include:

• the seriousness of the alleged offence or whether it is of a ‘technical’ nature only;

• the availability and efficacy of any alternatives to prosecution;

• the prevalence of the alleged offence and the need for deterrence, both personal and general;

• whether the alleged offence is of considerable public concern;

• the likely length and expense of a trial; and

• whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which the alleged offender has done so.

The PPC also lists a number of factors which “must clearly not” influence a decision whether or not to prosecute (PPC, [2.13]).

According to the PPC, the key consideration in deciding to initiate criminal proceedings is to ensure that the charge adequately reflects the nature and extent of the criminal conduct on the evidence, and will provide the court with an appropriate basis for sentencing (PPC, [2.18]). Ordinarily, the charge will be the most serious available, subject to issues such as available defences and the strength of the evidence (PPC, [2.19]). Other considerations influencing the choice of charges are that: (1) charges should not be laid to provide scope for subsequent charge-bargaining (PPC, [2.20]); and (2) charges should be laid under the provisions of a relevant specific Act (where applicable) rather than under the general provisions of the Crimes Act 1914 (Cth) (PPC, [2.21], eg the offence of conspiracy to defraud).

In addition to the PPC, the Draft MOU requires the CDPP to have regard to three specific factors in deciding whether to prosecute under the new cartel offences (PPC, [5.2]):

- the impact of the cartel on the market;
- the scale of the detriment caused to consumers or the public; and
- whether any of the cartel members have previously been found by a criminal or civil court, or admitted, to have engaged in cartel behaviour.

These factors are similar to, although not exactly the same as, the factors relevant to the ACCC’s decision to refer. They are also not provided for in the alternative (as they are under Draft MOU, [4.2]), suggesting that it is unlikely that the decision to prosecute will be based on any single factor. By and large these factors appear consistent with the general criteria listed under the PPC as well as the factors relevant to the public interest.

### 11.6 Gaps in the Draft MOU?

The Draft MOU is thin on detail in relation to several significant matters, for example, the approach to be taken to related criminal and civil proceedings and procedures for dealing with

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conflicts when they arise between ACCC and CDPP staff. These matters should be elaborated on either in the Draft MOU or in some other policy document and preferably one that is publicly available.

The Draft MOU also makes no reference to a number of matters that one would expect to find in such a document – in particular:

- the approach to be taken by the ACCC to settlements, penalty negotiations and enforceable undertakings and how this will intersect with referrals to the CDPP;
- information sharing and the treatment of confidential information;
- actions to recover penalties or costs and expenses;
- the circumstances, if any, where a prosecution will be brought for conspiracy to defraud instead of a cartel offence or together with a cartel offence,\(^{153}\) and
- the circumstances, if any, where a prosecution will be brought for a money-laundering offence instead of a cartel offence or together with a money laundering offence.\(^{154}\)


12. POWERS OF INVESTIGATION

The Exposure Draft Materials do not address critical questions relating to the powers of the ACCC to carry out criminal investigations under the new cartel offences.

The following powers will be relevant: powers to arrest and detain; require information, documents and evidence; enter, search and seize material from premises; conduct surveillance; and intercept telecommunications.

12.1 Existing investigatory powers – availability to be clarified?

The Discussion Paper refers to the ACCC’s existing powers under Part XII and Part XID of the Trade Practices Act 1974 (Cth) as relevant to investigation of the new cartel offences.

Under Part XII the ACCC has the power to require persons to furnish information, produce documents and appear and give evidence before the Commission pursuant to s 155(1) of the Trade Practices Act 1974 (Cth). This power is available if the ACCC has “reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes or may constitute a contravention of this Act.” The Draft Exposure Bill inserts a new definition of “contravention” into s 155(10), according to which “contravention, in relation to a law, includes an offence against ss 11.1, 11.4 or 11.5 of the Criminal Code (Cth) [a reference to the Code provisions for attempt, complicity and conspiracy] that relates to an offence against that law.” Inexplicably, however, no amendment to s 155(1) is proposed to enable the powers conferred under that section to be used in relation to a matter that constitutes or may constitute an offence under, as distinct from a contravention of, the Trade Practices Act 1974 (Cth). Thus, as it stands and contrary to the intention expressed in the Discussion Paper, it appears that the powers under s 155 could not be used to investigate conduct that may constitute a cartel offence, but could be used to investigate an attempt, for example, to commit such an offence.\(^\text{155}^\)

Before the Dawson Committee the ACCC proposed that its s 155 powers be extended so as to be available even after legal proceedings have been commenced. The Committee rejected the proposal as impinging on existing court processes.\(^\text{156}^\) Subsequently, however, it received qualified support from the Senate Economics Reference Committee in its 2004 small business report.\(^\text{157}^\) It is unclear whether this issue has been considered in connection with the introduction of the new cartel offences or whether it remains on the legislative agenda.

\(^{155}\) There are instances in which a contravention of a section in the Act is stated to be an “offence”: see, for example, ss 155(5A)-(6A). However, the new cartel offences are not framed in this way.


Pursuant to the recommendations of the Dawson Report, under amendments introduced in 2006, the ACCC has entry, search and seizure powers under Part XID of the *Trade Practices Act 1974* (Cth) (modelled on Part 1AA of the *Crimes Act 1914* (Cth)). The ACCC may enter premises with the consent of the occupier or otherwise pursuant to a search warrant issued by a magistrate. Pursuant to s 154X(2) such a warrant may be issued where the magistrate is satisfied by information on oath or affirmation that there are reasonable grounds for suspecting that there is evidential material on the premises or there may be within the next 72 hours. Under such a warrant, the executing officer may enter the premises, search for and seize evidential material, make copies of such material, operate electronic equipment at the premises to determine the accessibility of such material and take equipment and material onto the premises for such purposes (s 154G(1)). The Exposure Draft Bill adds to this: taking photographs and video recordings (s 154G(1A)); leaving the premises for not more than one hour and then returning to complete the execution of the warrant (s 154G(1B); removing things to another place for processing and examination to determine whether they should be seized (s 154(GA); and obtaining an order from a magistrate requiring a person to provide information or assistance in accessing data from a computer on the premises (s 154RA)).

As in relation to s 155(1), the provisions in this Part should be amended to make clear that these powers are available for use in investigating whether there has been an offence committed under the new cartel offences. Currently, the Part is directed at the investigation of “contraventions” and the collection of “evidential material”, defined as meaning “a document or other thing that may afford evidence relating to … a contravention of this Act.” That this does not extend to an offence under the *Trade Practices Act 1974* (Cth) is apparent from the distinction drawn between contraventions and offences under s 154G(1). That provision empowers an executing officer to seize other things that he or she finds while searching for the evidential material specified in the warrant and that he or she has reasonable grounds to believe to be evidence of an indictable offence under the *Trade Practices Act 1974* (Cth) and where he or she believes on reasonable grounds that it is necessary to seize such things in order to prevent their concealment, loss or destruction.

### 12.2 Availability of surveillance, access and interception powers?

As explained in the Discussion Paper, the criminalisation of serious cartel conduct opens up the possibility of new powers of investigation for the ACCC – specifically, powers relating to the use of surveillance devices which are dealt with under the *Surveillance Devices Act 2004* (Cth) (“*SD Act*”), and powers relating to telecommunications which are dealt with under the *Telecommunications (Interception and Access) Act 1979* (Cth) (“*TIA Act*”).

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158 *Trade Practices Legislation Amendment Act (No. 1) 2006* (Cth).
159 See also the distinction between “contravention” and “offence” in the context of s 76B.
Under the SD Act, warrants to use or retrieve surveillance devices may be issued by eligible Judges or nominated AAT members to law enforcement officers in connection with investigation of relevant offences. “Surveillance devices” include listening, optical and tracking devices.\textsuperscript{160} A “relevant offence” includes an offence against the law of the Commonwealth punishable by term of imprisonment of three years or more.\textsuperscript{161} Thus, the new cartel offences, with their proposed maximum term of five years imprisonment, would be relevant offences. A law enforcement officer in this context would be a member of the AFP,\textsuperscript{162} or possibly a member of the ACCC if appointed as a special member of the AFP for this purpose.\textsuperscript{163} The SD warrant authorises the use of a SD on specified premises or objects or in respect of conversations, activities or locations of specified persons or persons whose identities may be unknown, and the entry by force if necessary to premises to install, use, maintain or retrieve the device.\textsuperscript{164} Any information obtained from the use of a SD under a warrant may be used, recorded, communicated or published, or may be admitted into evidence, if it is necessary to do so for the purposes of the investigation of a relevant offence or the making of a decision whether or not to bring a prosecution of a relevant offence.\textsuperscript{165}

Under the TIA Act, there are three different mechanisms for intercepting and/or obtaining access to telecommunications data: (1) a stored communications warrant (“SC warrant”);\textsuperscript{166} (2) telecommunications data authorisation (“TD authorisation”);\textsuperscript{167} and (3) telecommunications services warrant (“TS warrant”).\textsuperscript{168} The law as it currently stands would enable the ACCC to use, either itself or through the AFP, a SC warrant or TD authorisation for the purposes of investigating conduct under the new cartel offences or the civil penalty prohibitions (existing and new), but not a TS warrant.

A SC warrant:

- authorises access to “stored communications”, defined as communications not passing over a telecommunications service and held on equipment by a carrier that cannot be accessed otherwise than with the assistance of the carrier;\textsuperscript{169} and

- may be issued by an issuing authority, that is a judge, magistrate or AAT member who has been appointed as such;\textsuperscript{170}

\begin{footnotes}
\footnotetext[160]{See definitions in s 6(1) of the Surveillance Devices Act 2004 (Cth).}
\footnotetext[161]{See para (a) in the definition of “relevant offence” under s 6(1) the Surveillance Devices Act 2004 (Cth).}
\footnotetext[162]{See para (a) in the definitions of “law enforcement agency” and “law enforcement agency” under s 6(1) of the Surveillance Devices Act 2004 (Cth).}
\footnotetext[163]{See s 40E of the Australian Federal Police Act 1979 (Cth).}
\footnotetext[164]{See 18 of the Surveillance Devices Act 2004 (Cth).}
\footnotetext[165]{See s 44 (5)(a)-(b) of the Surveillance Devices Act 2004 (Cth).}
\footnotetext[166]{See generally Chapter 3 of the Telecommunications (Interception and Access) Act 1979 (Cth).}
\footnotetext[167]{See generally Chapter 4 of the Telecommunications (Interception and Access) Act 1979 (Cth).}
\footnotetext[168]{See generally Chapter 2 of the Telecommunications (Interception and Access) Act 1979 (Cth).}
\footnotetext[169]{See s 5 (definitions) and s 117 of the Telecommunications (Interception and Access) Act 1979 (Cth).}
\end{footnotes}
to an “enforcement agency” which would include the ACCC as a body “whose functions include administering a law imposing a pecuniary penalty”,\textsuperscript{171}

where, amongst other things (eg relating to the form of the application), the information obtained by accessing the stored communication “would be likely to assist in connection with the investigation by the agency of a serious contravention”\textsuperscript{172} – “serious contravention” being defined to include “an offence punishable by imprisonment for a period, or a maximum period of at least three years”\textsuperscript{173} (and thereby including the new cartel offences).

Thus, under these provisions, the ACCC could obtain a SC warrant authorising it to obtain access to telephone conversations that have taken place in the past for the purposes of investigating conduct under the new cartel offences. The ACCC will be able to deal with information obtained under a SC warrant in various ways for the purposes of investigating such offences\textsuperscript{174} and will also be able to give such information in evidence in any proceeding.\textsuperscript{175}

A TD authorisation:

\begin{itemize}
  \item Provides an exception to the confidentiality protections under the \textit{Telecommunications Act} 1997 (Cth) by authorising a carrier to disclose information or documents that relate to the contents or substance of a communication that has been or is being carried by the carrier:
    \begin{itemize}
      \item on a voluntary basis if the disclosure is reasonably necessary for the enforcement of the criminal law or a law imposing a pecuniary penalty;\textsuperscript{176}
      \item in response to an authorisation provided by an authorised officer of an enforcement agency (which includes the ACCC) in relation to existing information or documents, provided the officer is satisfied that disclosure is reasonably necessary for the enforcement of the criminal law or a law imposing a pecuniary penalty;\textsuperscript{177}
    \end{itemize}
\end{itemize}

\textsuperscript{170} See s 5 (definition) and s 6DB of the \textit{Telecommunications (Interception and Access) Act} 1979 (Cth).
\textsuperscript{171} See s 5 (definition of “enforcement agency”) and s 110 of the \textit{Telecommunications (Interception and Access) Act} 1979 (Cth).
\textsuperscript{172} See s 166(1)(d) of the \textit{Telecommunications (Interception and Access) Act} 1979 (Cth).
\textsuperscript{173} See s 5E(1)(b) of the \textit{Telecommunications (Interception and Access) Act} 1979 (Cth).
\textsuperscript{174} See s 139 of the \textit{Telecommunications (Interception and Access) Act} 1979 (Cth).
\textsuperscript{175} See s 143 of the \textit{Telecommunications (Interception and Access) Act} 1979 (Cth), and s 5 (definitions of “lawfully accessed information”; “prescribed offence”); s 5B (definition of “exempt proceeding”).
\textsuperscript{176} See s 177 of the \textit{Telecommunications (Interception and Access) Act} 1979 (Cth).
\textsuperscript{177} See ss 178-179 of the \textit{Telecommunications (Interception and Access) Act} 1979 (Cth).
in response to an authorisation provided by an authorised officer of an enforcement agency (which includes the ACCC) in relation to prospective information or documents, provided the officer is satisfied that disclosure is reasonably necessary for the investigation of an offence against a law of the Commonwealth punishable by imprisonment for at least three years, and such authorisation may remain in force for up to 45 days.

Thus, under these provisions, the ACCC could authorise a telecommunications carrier to provide it with access to information or documents relating to telephone services and conversations (including information relating to the identities of the persons making or receiving calls, the locations of such persons, duration of calls, and the like) that have taken place or may take place in the future for the purposes of investigating conduct under the new cartel offences. The ACCC will then be able to disclose or use such information or documents provided disclosure or use is reasonably necessary for the enforcement of the criminal law or law imposing a pecuniary penalty. Presumably, “use” in this context includes use in evidence but there is no express provision to that effect.

A TS warrant:

- authorises the interception (i.e. listening to or recording by any means) communications passing over a telecommunications system (i.e. live communications, as distinct from stored communications) without the knowledge of the person making the communication;

- may be issued by an eligible Judge or nominated AAT member where, amongst other things, information likely to be obtained from the interception would be likely to assist in connection with the investigation of a serious offence.

The new cartel offences do not meet the threshold requirement under the definition of “serious offence” of being an offence punishable for a period or maximum period of at least seven years.

Thus, as pointed out in the Discussion Paper, given the proposed maximum of five years’ imprisonment for the new cartel offences, phone tapping would not be an investigative tool available to the ACCC in investigating these offences. The Discussion Paper invites comment on

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178 See s 5 (definition of “authorised officer”) of the Telecommunications (Interception and Access) Act 1979 (Cth).
179 See s 180 of the Telecommunications (Interception and Access) Act 1979 (Cth).
180 See s 143 of the Telecommunications (Interception and Access) Act 1979 (Cth), and s 5 (definitions of “lawfully accessed information”; “prescribed offence”); s 5B (definition of “exempt proceeding”).
181 See s 6 of the Telecommunications (Interception and Access) Act 1979 (Cth).
182 See s 46 of the Telecommunications (Interception and Access) Act 1979 (Cth).
183 See s 5D of the Telecommunications (Interception and Access) Act 1979 (Cth).
whether the *TIA Act* should be amended to extend telephone interception powers to the new cartel offences, and on whether the proposed term of five years is appropriate. The latter is addressed in Part 17 below and, as pointed out there, should be addressed separately from the question as to whether telephone interception powers should be available for criminal cartel investigations.

In relation to this question, the first issue is whether such powers are necessary for effective enforcement of the new cartel offences. That question cannot be answered without close examination of past and current investigatory practices of the ACCC to assess the extent to which telephone interception powers would enhance detection and prosecution of cartel behaviour. The experience of regulators in other jurisdictions that have or have considered attaining such powers should also be examined. In the time available such a study could not be undertaken for the purposes of this paper. However, it is possible to make the following observations that are likely to be relevant to consideration of this issue.

The ACCC already has substantial investigatory powers under Parts XII and XID of the *Trade Practices Act* 1974 (Cth) (assuming these are to apply to the new cartel offences: see [12.1] above) and under the *TIA Act* (specifically, access to recordings of past telephone conversations under a SC warrant and details, apart from the contents, of telephone conversations as they occur under a TD authorisation: see [12.2] above). With the introduction of the new cartel offences, its powers will be increased under the *SD Act*. In particular, the ACCC will be able to obtain use a series of surveillance devices to monitor conversations between cartellists.

Cartel investigations generally rely on information provided by informants and with the assistance of such persons, using surveillance devices, the ACCC will be able to listen to and record conversations between the informant and others allegedly involved in criminal cartel conduct as they occur (albeit, not two-way telephone conversations as this requires an interception). Telephone interception powers would not mean that the ACCC has to rely less on informants given the probability that information from such persons regarding the alleged criminal activity would still be required to satisfy the information conditions for the issue of the warrant.

There are likely to be few cases in which the ACCC could satisfy the Judge or nominated AAT member that a warrant should issue given the other methods of obtaining the same information available to the ACCC and given that the ACCC has to have shown that it has exhausted all such methods and that, without the warrant, interception of the communications would not otherwise be possible.\(^\text{184}\)

The ACCC has not called for telephone interception powers, at least not publicly.

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\(^{184}\) See the list of matters to which the Judge or member has to have regard in s 46(2) of the *Telecommunications (Interception and Access) Act* 1979 (Cth).
TS warrants are available for investigation of money laundering offences; in some cases, serious cartel conduct will constitute money laundering, and lawfully intercepted information (obtained under a TS warrant in connection with a money laundering investigation) may be given in evidence in an exempt proceeding which would include a proceeding by way of a prosecution for the new cartel offences.

In the United States, the Department of Justice (“DOJ”) was only given telephone interception powers in 2006 (although presumably the DOJ could previously be assisted by the FBI in this regard). The considerations that led to this conferral of powers and the ways in and extent to which they have been used in the United States to date should be examined. A similar inquiry should be made in relation to the experience in Canada where the Competition Bureau has been able to apply for judicial authorisation to intercept private communications without consent at least since 1999.

In the United Kingdom the OFT has not been given telephone interception powers in connection with investigations relating to its cartel offence. Inquiries should be made as to why the United Kingdom regulator was not given these powers and whether, in the six years since its criminal regime was introduced, it has been hampered in its investigations of criminal cartel conduct without such powers.

Neither the Organisation for Economic Co-operation and Development nor the International Competition Network, both of which have examined best practices with respect to anti-cartel law enforcement, have recommended that regulators have telephone interception powers.

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185 See s 5D(4) of the Telecommunications (Interception and Access) Act 1979 (Cth).
188 See s 74 and s 5B of the Telecommunications (Interception and Access) Act 1979 (Cth).
189 See s 5(d) (definition of “prescribed offence”) of the Telecommunications (Interception and Access) Act 1979 (Cth).
192 See ss 5-6 of the Regulation of Investigatory Powers Act 2000 (UK). It is possible that the Commissioner of Police could apply for an interception warrant on behalf of the OFT or the SFO. However, it is questionable whether the criteria of which Secretary of State has to be satisfied before issuing such a warrant would be met in the case of a criminal cartel investigation.
TS warrants are not available currently for investigations of offences under the Corporations Law (given that the maximum term of imprisonment for such offences is five years).  

If telephone interception powers are not made available immediately upon the introduction of Australia’s new cartel offences, there is no reason why the experience in carrying out investigations cannot be reviewed at some stage in the future to determine whether such powers in fact are required.

Having taken the above-mentioned factors and others into account in the context of the study referred to above, if the view is reached that the ACCC does require telephone interception powers, then the next question is whether the degree of necessity outweighs countervailing human rights and privacy considerations. These considerations raise challenging questions of public policy that are not addressed in this paper.

12.3 Powers of arrest and detention?

The Exposure Draft Materials do not provide any information relating to powers of arrest and detention in connection with the new cartel offences. Presumably, the ACCC will rely on the AFP for such purposes, although it is also possible that ACCC staff may be appointed as special members of the AFP to assist AFP members in carrying out such activities.

Powers of arrest and detention and related powers by the AFP are governed by the Crimes Act 1914 (Cth) (see Part IAA, Division 4 and Part 1C, in particular).

The ACCC no doubt has arrangements with the AFP in connection with the criminal offences under Part VC relating to the consumer protection provisions of the Trade Practices Act 1974 (Cth). However, details regarding these arrangements are not publicly available.

In connection with the Schedule Version of Part IV (which will include the new cartel offences), arrest and detention may be governed by the provisions of relevant State and Territorial legislation.

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194 This may be on the agenda, however, of a group involving ASIC, ACCC, AFP and the CDPP considering how and what additional powers may be necessary to boost regulatory prosecutions in Australia: see “Bank makes Batchelor its man in Moscow”, Australian Financial Review, 2 June 2007, p 64.


196 See s 40E of the Australian Federal Police Act 1979 (Cth).
12.4 Limitations on the use of powers of investigations – privileges and immunities

12.4.1 Privileges against self-incrimination and exposure to penalty

The current position concerning the privileges against self-incrimination and self-exposure to penalty in relation to the ACCC’s civil investigatory powers will continue to apply where the ACCC uses the same powers to investigate conduct under the new cartel offences. Under the relevant provisions of the *Trade Practices Act 1974* (Cth) these privileges have been abrogated so that persons are not excused from:

- answering questions, furnishing information or producing documents pursuant to a s 155(1) notice (s 155(7)); or
- answering questions or producing documents in evidence before the ACCC (s 159(1)); or
- answering questions or producing evidential material to an executing or assisting officer executing a search warrant under the new search and seizure regime under Part XID (s 154R(3));
- on the grounds that the information or documents may tend to incriminate or expose the person to a penalty.\(^\text{197}\)

However, the *Trade Practices Act 1974* (Cth) does allow for use-immunity by stipulating that any such material provided by an individual in these contexts is not admissible in evidence against the individual in any criminal proceedings (which would include proceedings under the new cartel offences) other than in proceedings for an offence relating to a refusal or failure to comply with a s 155 notice or the offences relating to the provision of false or misleading information or obstruction of Commonwealth officials under the *Criminal Code* (Cth) (ss 155(7), 159(2), 154R(4)).

Consistent with the fact that the privileges against self-incrimination and exposure to penalty are not available to corporations,\(^\text{198}\) the use-immunity does not extend to corporations, so that material provided by a corporation in these contexts would be admissible in criminal proceedings (include proceedings under the new cartel offences) against the corporation.

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\(^{197}\) Note that s 155(7) and 159 use the words “may tend” to incriminate whereas s 154R(3) and s 86F use “might tend”. The test should be consistent in all three of these provisions.

Given the use immunity that applies to s 155 and Part XID, it is not clear whether there will be powers pursuant to which the ACCC will be able to require an individual to attend and be interviewed and for the information and documents provided in the interview to be admissible as evidence in a subsequent criminal proceeding. As far as search and seizure are concerned, as previously mentioned, it is possible that the ACCC may rely on the AFP or may be able to act as special members of the AFP exercising powers under Part 1AA of the *Crimes Act* 1914 (Cth) for these purposes.\(^{199}\) Information or documents obtained pursuant to the exercise of such powers would be admissible in criminal proceedings. However, they would be inadmissible in civil proceedings.\(^{200}\)

The *Trade Practices Act* 1974 (Cth) does not provide for derivative-use immunity, however, and this means that the ACCC is not prevented from using the information or documents gathered pursuant to its powers under s 155 and Part XID to establish a chain of inquiry and from using evidence derived from that chain on inquiry against the individual in criminal proceedings.\(^{201}\)

The Draft Exposure Bill also proposes a new s 86F which prevents a person from refusing to answer questions or produce documents in civil or criminal court proceedings or in accordance with requirements under the *Trade Practices Act* 1974 (Cth) (eg in response to a s 155(1) notice) on the grounds that to do so “might tend to expose the person to a penalty by way of an order under s 86E”, that being the section under which orders disqualifying persons from management of corporations may be made. This amendment reflects the recent decision by the High Court that proceedings for disqualification and banning orders are punitive, and so attract the privilege against exposure to penalty (*Rich v ASIC* (2004) 209 ALR 271), after a line of authority had maintained they were protective in nature.

### 12.4.2 Legal professional privilege – clarify scope of the protection?

The Dawson Report recommended, consistent with the High Court decision in *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543, that the *Trade Practices Act* 1974 (Cth) be amended to provide expressly that s 155 does not override legal professional privilege. Section 155(7B) was subsequently inserted into the *Trade Practices Act* 1974 (Cth), providing that s 155 “does not require a person to produce a document that would disclose information that is the subject of legal professional privilege.” This provision will apply regardless of whether the powers under s 155 are being used for civil or criminal investigations.

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\(^{199}\) See s 3D(2) re the dual operation of Part 1AA of the *Crimes Act* 1914 (Cth) and Part XID of the *Trade Practices Act* 1974 (Cth).


However, it should be amended to clarify that the privilege applies not only to the production of documents, but also to the furnishing of information and answering of questions pursuant to a s 155 notice.

Similarly, a corresponding provision should be inserted into Part XID as to remove any doubt that the privilege applies also in relation to evidential material subject to a warrant under that Part (consistent with the position in relation to the search and seizure powers under the *Crimes Act* 1914).\(^{202}\)

Federal investigatory bodies exercising powers under the *SD Act* and the *TIA Act* generally take the position that the powers in those Acts override client legal privilege, consistent with the decision in *Carmody v MacKellar* (1997) 76 FCR 115.\(^{203}\)

On 13 February 2008 the ALRC released its report on client legal privilege and federal investigations.\(^{204}\) If adopted, its central recommendation in favour of general legislation covering the law and procedure governing client legal privilege claims in federal investigations and the contents of any such legislation will affect the exercise of powers by the AFP and ACCC in cartel investigations. Other aspects of the report, for example in relation to practice and procedure in making and resolving client privilege claims in federal investigations, are also worth examining in connection with the criminal cartel regime (as well as more generally in connection with the ACCC’s current exercise of its powers under s 155 and Part XID). It has not been possible to consider the report in detail for the purposes of this paper.

### 12.5 Procedures relevant to criminal investigations?

The Exposure Draft Materials do not provide any information relating to the procedures that will govern investigations under the new criminal cartel regime. However, criminal investigations and proceedings involve stricter rules of procedure and evidence than civil investigations and proceedings. It follows that the methods employed in gathering, handling and adducing evidence are different in a criminal setting from in a civil setting. In criminal investigations, for example, there are rules that govern cautioning of persons under or potentially subject to arrest, rights to communicate with a relative or friend and to legal advice while under questioning, length of questioning, tape-recording of interviews, and the like.

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\(^{202}\) *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543, [27], [50]-[51].


The sources and nature of these rules vary depending on the arrest status of the person under investigation, the nature of the offence being investigated and the identity of the investigating officials. For federal offences, the principal sources of such rules are the general law, the *Crimes Act 1914* (Cth) (Part IC) and the *Evidence Act 1995* (Cth) (see, eg, ss 138-139).

However, for the Schedule Version of Part IV (which will include the new cartel offences), rules under State and Territory legislation will apply.

The procedures involved in criminal investigations have significant implications for the ACCC’s systems and staff. In 2005 the ACCC announced the establishment of a criminal enforcement and cartel branch that was said, in consultation with the CDPPP and other regulators, to be re-designing its information gathering and management systems and training its staff to be ready for criminal investigations “from day one.”

12.6 Parallel criminal and civil investigations

Upon receipt of information about alleged cartel activity the ACCC often will not be in a position to know at the outset whether it should be investigated as a criminal or civil matter. Yet plainly this distinction will be material to the types of powers used and procedures followed in exercising the powers of investigation available to the ACCC. In practice, it may well be that the ACCC adopts the approach of the United Kingdom OFT in adhering to the criminal procedures relevant to investigations and evidence-gathering in relation to every investigation from the outset so as to allow for the use and admissibility of evidence gathered in any possible future criminal proceeding. However, pursuing every matter as potentially criminal also has resources and costs implications.

As was recognised in the ACCC’s Submission to the Dawson Committee, it will be crucial that the ACCC consult with the CDPP at the earliest stage possible about the approach taken to investigation of any matter that is potentially a criminal matter. The Draft MOU indicates that this consultation will be undertaken where the ACCC is considering referral to the CDPP (Draft MOU, [4.1]). However, even if informally, it may be necessary for consultation to take place prior to this stage, especially where assessments about referral cannot be made until a certain amount of investigation and evidence gathering has been undertaken.

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12.7 Offences relating to the powers of investigation and administration of justice

It is an offence not to comply with or to knowingly provide false or misleading information in compliance with a notice under s 155(1) (s 155(5)), punishable by a fine not exceeding 20 penalty units or imprisonment for 12 months (s 155(6A)). It is also an offence to fail to comply with a requirement of an officer executing a warrant under Part XID to answer questions or produce evidential material, punishable by fine not exceeding 30 penalty units or imprisonment for 12 months (s 154R(2)).

In addition, with the introduction of the new cartel offences, Part III of the Crimes Act 1914 (Cth), establishing offences relating to the administration of justice, will apply. Such offences include fabricating evidence, destroying evidence, intimidating witnesses, conspiracy to defeat justice and attempting to defeat justice. These offences attract penalties of up to five years imprisonment.

12.8 Guidelines?

The ACCC should develop guidelines on the powers of investigation that will apply under the new criminal regime, explaining what powers will be available, who will exercise them and under what conditions, what procedures will be followed in exercising such powers, what privileges and immunities will apply, how parallel criminal and civil investigations will be handled and what offences relating to investigations and proceedings exist. See, for example, the guidance that has been published on such matters by the United Kingdom OFT. In accordance with its usual practice, the ACCC should first publish draft guidelines or a discussion paper for comment. It will need also to revise its current guidelines of the operation of s 155 of the Trade Practices Act 1974 (Cth).

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13. IMMUNITY

There is information relevant to immunity under the new criminal regime in the Draft MOU, the ACCC’s existing Immunity Policy for Cartel Conduct\(^\text{211}\) and the CDPP’s immunity policy as set out in the PPC.\(^\text{212}\)

13.1 The Draft MOU

Immunity is dealt with in s 7 of the Draft MOU, which provides as follows:

- Applicants seeking immunity from civil and criminal proceedings must make their applications to the ACCC.\(^\text{213}\)

- The ACCC will manage these applications:
  - for civil proceedings, up until the point of deciding whether to grant or refuse immunity;
  - for criminal proceedings, up until the point of deciding whether to refer the matter to the CDPP for prosecution and, if not, deciding whether to recommend to the CDPP that the applicant be granted criminal immunity.

- The ACCC will decide whether to grant immunity from civil proceedings in accordance with its published immunity policy in relation to cartel conduct, but only after consultation with the CDPP where the matter also concerns criminal investigation and prosecution.

- Where the matter is not to be referred to the CDPP for criminal prosecution, the ACCC will decide whether to recommend to the CDPP that the applicant be granted criminal immunity based on its published immunity policy in relation to cartel conduct.

- If the ACCC recommends immunity, the CDPP will decide whether to grant immunity from criminal proceedings in accordance with the PPC.

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\(^\text{213}\) It is difficult to imagine a scenario in which an applicant would apply for only civil or only criminal immunity.
The Draft MOU has to be read in conjunction with the ACCC’s immunity policy and the CDPP’s immunity policy.

### 13.2 The ACCC immunity policy

Under the Draft MOU decisions by the ACCC to grant immunity from civil proceedings or recommend to the CDPP that immunity from criminal proceedings be granted are to be made in accordance with its published immunity policy in relation to cartel conduct.

The ACCC published its Immunity Policy for Cartel Conduct in August 2005 (following an extensive review of its 2003 Leniency Policy for Cartel Conduct). The policy is to be read in conjunction with its Interpretation Guidelines.\(^{214}\) In summary, under that policy, the ACCC will grant immunity if:

- the applicant applies for immunity under the policy and satisfies the following conditions:
  - the applicant is or was a party to a cartel;
  - admits that its conduct may breach the *Trade Practices Act* 1974 (Cth);
  - is the first to apply for immunity in respect of the cartel;
  - has not coerced others to participate in the cartel and was not the clear leader of the cartel; and
  - has ceased involvement or indicates to the ACCC that it will cease involvement.
  - in the case of a corporate applicant, its admissions are truly a corporate act and not simply the isolated confessions of certain representatives;

- at the time of receipt of the application the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the *Trade Practices Act* 1974 (Cth) arising from the conduct in respect of the cartel; and

- the applicant provides full disclosure and cooperation to the ACCC.

The policy provides for corporate immunity, derivative immunity (to cover employees and officers of a corporation with corporate immunity) and individual immunity. It also has provisions

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relating to the placement of markers; affirmative amnesty; oral applications; use of information provided in the application process and other related matters.

In practice, the ACCC is prepared to grant immunity under its policy at the early stages of an investigation and even before an investigation into the cartel that is the subject of the immunity application has begun. It regards the immunity policy as one of, if not the, most important tools at its disposal in detecting and prosecuting cartel conduct.\textsuperscript{215}

\textbf{13.3 The CDPP immunity policy}

Under the Draft MOU the decision to grant immunity from criminal proceedings is to lie with the CDPP in accordance with the PPC.\textsuperscript{216} The CDPP has the power to grant such immunity, by way of an undertaking not to prosecute, under s 9(6D) of the \textit{Director of Public Prosecutions Act 1983} (Cth).\textsuperscript{217}

Under the PPC, such an undertaking will only be given provided the following two conditions are met (PPC, [5.5]):

\begin{enumerate}
  \item the evidence that the accomplice can give is considered necessary to secure the conviction of the defendant, and that evidence is not available from other sources; and
  \item the accomplice can reasonably be regarded as significantly less culpable than the defendant.
\end{enumerate}

Assuming these two conditions are met, the “central issue” that the CDPP will consider under the PPC in deciding whether to give an undertaking is whether “it is in the overall interests of justice that the opportunity to prosecute the accomplice in respect of his or her own involvement in the crime in question should be foregone in order to secure that person’s testimony in the prosecution of another” (PPC, [5.6]). In making this assessment, the CDPP takes account of the following matters:

\begin{enumerate}
  \item the degree of involvement of the accomplice in the criminal activity in question compared with that of the defendant;
\end{enumerate}


\textsuperscript{217} It also has the power under s 9(6) to undertake that answers given in evidence in proceedings will not be admissible in evidence against the person, other than in proceedings in respect of the falsity of evidence given by the person.
(b) the strength of the prosecution evidence against the defendant without the evidence it is expected the accomplice can give and, if some charge or charges could be established against the defendant without the accomplice's evidence, the extent to which those charges would reflect the defendant's criminality;

(c) the extent to which the prosecution's evidence is likely to be strengthened if the accomplice testifies - apart from taking into account such matters as the availability of corroborative evidence, and the weight that the arbiter of fact is likely to give to the accomplice's testimony, it will also be necessary to consider the likely effect on the prosecution case if the accomplice does not come up to proof;

(d) the likelihood of the weakness in the prosecution case being strengthened other than by relying on the evidence the accomplice can give (for example, the likelihood of further investigations disclosing sufficient independent evidence to remedy the weakness);

(e) whether there is or is likely to be sufficient admissible evidence to substantiate charges against the accomplice, and whether it would be in the public interest that the accomplice be prosecuted but for his or her preparedness to testify for the prosecution if given an undertaking under the Trade Practices Act 1974 (Cth); and

(f) whether, if the accomplice were to be prosecuted and then testify, there is a real basis for believing that his or her personal safety would be at risk while serving any term of imprisonment.

These provisions in the PPC focus very much on accomplices. However, it is to be borne in mind that cartel activity will involve joint principals as well as accomplices. More fundamentally, the provisions set out above indicate that the CDPP has maximum discretion in making determinations about immunity (contrary to the statement in the draft MOU that both “the DPP and ACCC recognise that maximisation of certainty and minimisation of discretion as far as reasonably possible are crucial to the effective operation of immunity policies for cartel conduct” ([Draft MOU, 7.1]).

As crucially, the practice of the CDPP is to make decisions about immunity at the conclusion of an investigation218 and the PPC makes it clear that undertakings under s 9(6D) will only be given “as a last resort” (PPC, [5.4]).219 The latter reflects the basic prosecutorial philosophy that

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persons of equal or greater complicity should not escape prosecution while others of equal or lesser complicity are charged.

13.4 How are the differences between the ACCC and the CDPP immunity policies to be dealt with?

There are significant differences and inconsistencies between the approach to immunity by the CDPP and the approach by the ACCC, both in terms of the stage at and the conditions under which immunity will be granted. While these differences stem from a fundamental cultural difference between the ACCC as a regulatory agency and the CDPP as a law enforcement agency, the effectiveness of the immunity program in relation to anti-cartel law enforcement depends on these differences in approach to immunity being addressed and the two policies being made as certain and consistent as possible.220

Various different models for resolving such issues present themselves from overseas experience (in particular, from the United Kingdom, Canada and Ireland). These models were referred to briefly in the Dawson Report.221 The Committee considered that the pros and cons in relation to each of these models and the difficulties in relation to the handling of immunity should be examined in detail and resolved before criminal sanctions are introduced.222

Presumably these issues were considered by the Working Party and recommendations made. However, the Working Party’s Report has not been published.

The Treasurer’s Press Release indicated that the PPC would be amended to enable immunity to be granted at an early stage in an investigation.223 The Treasurer’s Press Release further appeared to indicate that, on the recommendation of the ACCC, immunity from criminal proceedings would be granted where the applicant satisfied the following conditions:

- the ACCC was not already aware of the conduct;

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• the applicant was first to come forward (subsequent applicants for immunity would be dealt with under the existing provisions of the PPC);

• the applicant was not a clear individual leader in the cartel;

• the applicant had not coerced anyone to join the cartel; and

• the applicant full cooperates with the ACCC and attends court to give evidence if required.224

The Exposure Draft Materials make no mention of any proposal to amend the PPC to reflect such a significant change in approach by the CDPP – both as to the timing of a grant of immunity and the conditions under which it will be granted.225 Assuming such a proposal is still contemplated, it is difficult to understand why it was not foreshadowed in the Exposure Draft Materials. If amendment of the PPC along the lines indicated in the Treasurer’s Press Release is proving too difficult (for whatever reason), an alternative approach would be to make the ACCC and CDPP joint decision-makers in relation to criminal immunity, applying the ACCC’s Immunity Policy. However, given the differences in cultures previously referred to, there must be substantial doubt as to whether such an approach in fact would engender the level of certainty and speed of response required for the policy to be attractive to prospective applicants.

13.5 Should the relationship between immunity and referral be clarified?

The Draft MOU indicates that the ACCC will consult the CDPP in relation to the management of and decisions on applications for civil immunity where the matter also concerns criminal investigation and prosecution. The practical effect of this seems to be that the ACCC will not make a decision on civil immunity until it has made a decision on whether or not to pursue the matter as a criminal investigation and possibly also, on whether or not it should be referred to the CDPP for prosecution, and in any event not until it has consulted with the CDPP.

Equally, it is evident that the ACCC will only make decisions about whether to recommend criminal immunity to the CDPP once it has considered the question of referral. If the ACCC decides not to refer the matter, then it will make a recommendation to the CDPP based on an assessment as to whether the applicant meets the criteria set out in the ACCC’s immunity policy. However, if it decides to refer a matter for criminal prosecution to the CDPP, then it appears that no possibility of an ACCC recommendation of immunity arises.

224 Note that these largely reflect the conditions under the ACCC’s current immunity policy with some slight modifications which reflect the outcome of the review undertaken in 2004.

225 Cf Mark Pearson, Executive General Manager, Enforcement and Compliance, ACCC, Criminalisation of Cartels, Paper given at American Bar Association, International Cartels Workshop, San Francisco, January 31-February 2 2008 in which Pearson confirms that there will be a change in the PPC to enable immunity to be granted up front.
The inevitable effect of this proposed system is that ACCC decisions relating to civil immunity and now also recommendations on criminal immunity may not be able to be made quickly and will be bound up with assessments related to referral to the CDPP, the outcomes of which are in many cases likely to be uncertain and difficult to predict.

Furthermore in terms of outcomes, ACCC decisions regarding immunity, civil and criminal, will depend upon the referral decision. This creates the following anomalies and uncertainties:

- If the ACCC decides not to refer a matter for prosecution it then may recommend to the CDPP that the applicant be granted immunity from criminal proceedings – but it is unclear why immunity would be required if the matter is not being referred given that the Draft MOU does not appear to contemplate prosecutions being launched in the absence of referral. That said, from the perspective of an accused, it would be desirable to attain immunity notwithstanding the ACCC’s decision not to refer.

- If the ACCC decides to refer a matter for prosecution, then it is still able to grant civil immunity but it is not clear whether in these circumstances it can also make a recommendation as to criminal immunity, despite the same criteria being applicable to both. Indeed, it is difficult to imagine why the ACCC would grant civil immunity and still refer a matter for criminal prosecution given that, if an immunity applicant’s evidence is considered necessary for a civil proceeding against the other cartel participants, then it is likely to be just as if not more important for a criminal proceeding.

- Once referred for prosecution, the Draft MOU does not appear to contemplate that the CDPP thereafter may yet consider a possible grant of immunity or, if it does, it is not clear whether it will be on the basis of a recommendation from the ACCC or on some other basis.

- It is also not clear what the policy is likely to be in respect of information provided to the ACCC in connection with immunity applications (whether or not the application is successful) and, in particular, whether this information will be available to the CDPP for use in a criminal prosecution. The potential for such information to be used in this way would represent a major disincentive to immunity applicants.

The points raised illustrate the need for the proposed immunity system to be elaborated in greater detail in the Draft MOU, for both the CDPP and ACCC immunity policies to be amended, for guidelines to be published and, under such guidelines, for worked examples to be provided to assist practitioners and parties in understanding how the system is likely to work in practice. Otherwise, the attributes of transparency, certainty and predictability, so critical to the effectiveness of an immunity program, are likely to be sorely lacking under the new criminal regime.
13.6 Should the ACCC’s immunity policy be amended?

As stated above, once the legislation has been passed, the ACCC will need to revise its current immunity policy to reflect the amendments. Presumably, in keeping with its past practice, the ACCC will release a draft of the revised policy for comment.

At the very least the policy should be revised to explain the different procedures and timing of decisions with respect to applications for civil and criminal immunity and to explain the role of the CDPP and interaction between that agency and the ACCC, in particular. It will also need to be revised to reflect the new provisions under the “protected cartel information” scheme (see Part 14 below) as these provisions will have a bearing on the position taken by the ACCC on the use of information provided to it by immunity applicants.

More substantively, notwithstanding the significant revisions to the policy in 2004, the ACCC should take the opportunity presented by these developments to re-assess whether the policy reflects international best practice, including considering what may be learnt from other jurisdictions with dual civil/criminal systems and separate regulatory and prosecutorial agencies, as well as the latest economic thinking on the most effective design and operation of immunity programs. In the course of this re-appraisal, some of the issues that should be examined include:

- whether, upon satisfaction of specified conditions, immunity should be final rather than conditional upon the resolution of any ACCC court proceedings against other cartel participants;
- whether the coercion or “clear leader” exception to the policy should be further clarified or removed altogether;
- whether the requirement that the ACCC not have received written legal advice that it has sufficient evidence to commence proceedings should be removed;
- whether the circumstances in which immunity may be revoked should be narrowed or there should be provided some mechanism for review of a revocation decision;

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226 The Australian Competition and Consumer Commission *Immunity Policy Interpretation Guidelines* (2005) [http://www.accc.gov.au/content/index.phtml/itemId/708758](http://www.accc.gov.au/content/index.phtml/itemId/708758), viewed 14 February 2008, refer to the government’s announcement of its intent to introduce criminal sanctions and state “The ACCC will amend its immunity policy and these guidelines when this occurs” [17].


whether there might be ways in which the so-called “paperless” process can be made even more effective from the perspective of immunity applicants; and

whether there should be a “penalty plus” aspect to the policy.
14. ACCESS TO INFORMATION HELD BY THE ACCC: THE “PROTECTED CARTEL INFORMATION” SCHEME

The Exposure Draft Bill invests substantial discretion in the ACCC with respect to providing access to documents and information in its possession, while at the same time significantly limits the capacity of others to obtain access to such documents or information through legal processes. This is the effect of the scheme set out in ss 157, 157B, C and D. Central to the scheme is the concept of “protected cartel information” (“PCI”).

14.1 The definition of PCI

PCI is defined as information that was given to the ACCC in confidence and relates to a breach or possible breach of the new cartel offence provisions or the new civil penalty prohibitions.\(^{230}\)

It is not clear why information that relates to a breach or possible breach of the s 45 provisions is not included in the scheme.

Interpretational difficulties in relation to this definition immediately suggest themselves – most obviously potential difficulties in determining:

- the circumstances in which information will be held to have been given “in confidence” (for example, it is not clear whether statements recorded in a transcript of a s 155 examination would be regarded as confidential in this sense); and
- what is sufficient to establish the relationship between the information and the breach or possible breach.

14.2 Relevant factors determining disclosure of PCI

The scheme provides an exhaustive list of factors that will be relevant in determining when PCI is disclosed (divulged or communicated)\(^{231}\) ("the relevant factors"). That list is as follows:\(^{232}\)

- the fact that the protected cartel information was given to the ACCC in confidence;
- Australia’s relations with other countries;
- the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;

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\(^{230}\) See ss 157B(7), 157C(7).

\(^{231}\) See s 157B(7).

\(^{232}\) See ss 157(1B), 157B(5), 157C(5).
in a case where the protected cartel information was given by an informant:

- the protection or safety of the informant or of persons associated with the informant; and
- the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future.

Depending on the context, additional factors apply.

As is evident from this list, the PCI scheme appears to be aimed primarily at restricting access by third parties to information provided to the ACCC by persons in compliance with s 155 notices or in connection with penalty negotiations; by foreign regulators in connection with investigation of serious cartel conduct on an international scale; and by informants, including in connection with applications for immunity. The ACCC has a history of resisting attempts by third parties to obtain access to such information. However, there are increasing indications that such documents may be accessible under statutory or court-approved compulsory processes – for example, under subpoena, freedom of information legislation, discovery rules and Order 46 of the Federal Court Rules – and limits on the extent to which the ACCC may rely on various privileges (eg without prejudice privilege; public interest privilege; legal professional privilege) to resist access.\(^{233}\)

### 14.3 Contexts in which the PCI scheme applies

There are three contexts in which the scheme applies:

- where a respondent to a proceeding brought by the ACCC seeking a civil penalty or remedy under Part VI seeks access to PCI that tends to establish the respondent’s case (s 157(1A-(1B));

- where the ACCC may be required to produce PCI to a court or tribunal (s 157B);

- where access to PCI is sought from the ACCC by a party or prospective party in a proceeding to which the ACCC is not a party (s 157C).

\(^{233}\) See Baxt B, “Cracking Cartels: International and Australian Developments: International Cooperation”, (2004), [http://www.accc.gov.au/content/index.phtml/itemId/566510/fromItemId/3765](http://www.accc.gov.au/content/index.phtml/itemId/566510/fromItemId/3765) viewed 12 February 2008, and the cases referred to therein. Also, more recently, see Cadbury Schweppes Pty Ltd v Amcor Ltd [2008] FCA 88, and note in particular the comments of Gordon J at [46]-[47]. Generally, by virtue of s 155AAA, the ACCC is prohibited from disclosure of information given to it in confidence or obtained under Part XID or s 155 and relating to a matter under Part IV unless required or permitted to do so under the Act or a law of the Commonwealth.
The effect of these provisions appears to be as follows.

- Under s 157(1A): the ACCC is not required to comply with a request for access to documents under s 157(1), as it would otherwise be required to do, if the documents contain PCI, provided the ACCC has had regard to the relevant factors, and a court is not entitled to direct the ACCC to comply. Sections 157(1)-(1A) apply only to requests for access to information by respondents in civil proceedings, and hence should have no bearing on the usual prosecutorial obligation to disclose evidence to an accused in a criminal case.

- Under s 157B (mirroring largely the common law position in relation to public interest immunity):
  
  o the ACCC may produce a document containing PCI or disclose PCI to a court or tribunal, subject to having regard to the relevant factors (subs (4));

  o but the ACCC is not to be required to produce such a document or disclose such information except with the leave of the court or tribunal, and in granting such leave, subject to the court or tribunal having regard to the relevant factors (subs (1));

  o and if a document is produced or information is produced or disclosed in either way, it is not to be produced or disclosed in other proceedings except where the ACCC has exercised its power under subs (4) or a court or tribunal has given leave under subs (1) in relation to the other proceedings.

- Under s 157C:

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234 As listed in s 157(1B) (see [15.2] above) and including also in this context: the legitimate interests of the corporation or person making the request (e) and such other matters (if any) as the Commission considers relevant (f). Consider the likely interpretation of “legitimate interests” in (e) – presumably this consideration would extend first and foremost to the relevance of the information in question to the respondent’s capacity to test or refute the ACCC’s allegations. Consider the extent to which (f) broadens the power?

235 Section 157(2).

236 As listed in s 157B(4) (see [15.2] above) but including also in this context: in the case of production or disclosure to a court – the interests of administration of justice; and in the case of production or disclosure to a tribunal – the interests of securing the effective performance of the tribunal’s functions (ss 157B(5)(e)-(f)). Furthermore, the ACCC must not have regard to any other matters. The latter appears a tokenistic attempt to confine the ACCC’s discretion.

237 Section 157B(1).

238 As listed in s 157B(2) (see [15.2] above) but including also in this context: in the case of production or disclosure to a court – the interests of administration of justice; and in the case of production or disclosure to a tribunal – the interests of securing the effective performance of the tribunal’s functions (ss 157B(2)(e)-(f)).

239 See ss 157B(3), (6).
the ACCC may, on the application of a person, provide a copy of a document containing PCI, to the person where the person is a party in the proceeding or is considering instituting proceedings and the proceedings have not yet been instituted (subss (3)-(4)), subject to having regard to the relevant factors;

but the ACCC is not to be required to make discovery (however described) to the person in either circumstance (and there is no provision for leave by a court akin to the provision under s 157B(1));

and if a document is so produced, it must not be adduced in other proceedings before the same court or another court or a tribunal except where the ACCC has exercised the power under subs (3)-(4), or in accordance with leave granted under s 157B(1) in relation to the other proceedings, or as a result of an exercise of power under s 157B(4) in relation to the other proceedings.

The drafting of these provisions leaves much to be desired. In particular, it is not clear why s 157B(1) has been formulated in such a way that it provides, in effect, that the ACCC may only be required to produce or disclose PCI documents or information with the leave of the court. This provision presumably would become relevant only if the ACCC decides not to exercise its power under s 157B(4) to voluntarily produce or disclose the information. However, if this is so, then it would not be the ACCC seeking the leave under s 157B(1). Rather, it appears to be contemplated that the respondent/defendant to the proceeding would apply for leave to require (for example, by way of subpoena, a notice to produce, an application for leave to inspect court documents under Order 46 of the Federal Court Rules or a request under the Freedom of Information Act 1982 (Cth)) the ACCC to make production or disclosure. A simpler way to achieve the same end, it seems, would be to provide that the ACCC is not required by any law or regulation to produce or disclose PCI unless, upon application by the respondent/defendant or other third party, it is ordered to do so by the court.

14.4 The impact of the PCI scheme

The PCI scheme has significant implications in that it limits the capacity of defendants or respondents to obtain documents or information from the ACCC that would assist in testing or refuting the ACCC’s allegations, and also the capacity of private litigants to obtain information relevant to mounting a damages claim (to the extent that any s 83 findings of fact are insufficient for this purpose).

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240 See ss 157C(3)-(4).
241 As listed in s 157C(5) (see [15.2] above) but including also in this context: the interests of the administration of justice (e).
242 See ss 157C(1), (2).
Clearly the list of relevant factors represents an attempt in each context to balance competing interests:

- the interests of those who provide information to the ACCC in confidence in ensuring that that confidentiality is preserved;

- the interests of the ACCC in ensuring such informants are not deterred from providing information out of concern that it may subsequently be disclosed and also in ensuring that other regulators are not similarly deterred by the risk that disclosure would pose to their own investigations;

- the interests of those seeking to defend themselves in proceedings brought by the ACCC or private claimants; and

- the public interest in ensuring that justice can be done and be seen to be done in such cases.

In apparent recognition of the potentially significant impact of this scheme on the conduct of proceedings and the rights of persons facing allegations under the new cartel offence or civil penalty prohibitions, s 157D represents an attempt to preserve certain powers of the court – in particular, the power to deal with abuses of process\(^{243}\) and the power to stay a proceeding on the ground that the refusal by the court to require the ACCC to produce or disclose PCI would have a substantial adverse effect on the defendant’s right to a fair hearing (in a criminal proceeding)\(^{244}\) or on the hearing (in a civil proceeding).\(^{245}\)

These safeguards are directed at protecting the rights or interests of persons in respect of whom, by reason of the new provisions, access to information is denied. However, arguably, there needs to be further consideration of the interests of persons whose information is disclosed to third parties under the scheme. Under s 157B there presumably will be an opportunity for such persons to make submissions to the court deciding whether to give leave to compel the ACCC to disclose such information. Under s 157C, where there is no provision made for a court to give leave, there is a good argument that, as matter of procedural fairness, the ACCC should be required to invite such submissions and take account of them before deciding whether to voluntarily disclose information.

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\(^{243}\) See s 157D(1) but note that this power is only preserved to the extent that there is nothing in ss 157B, C that expressly or impliedly provide otherwise.

\(^{244}\) See s 157D(2).

\(^{245}\) See s 157D(2). Factors that a court must consider in ordering a stay of a civil proceeding are set out in s 157D(4).
Such safeguards aside, whether in practice a proper balance between the various competing interests affected by the PCI scheme is reached will depend in large part on the way in which the ACCC exercises its substantial discretion in connection with the voluntary release of information and on the approach taken by the Court in determining whether information should be released in cases in which the ACCC decides not to do so voluntarily. The operation of the scheme should be reviewed in due course (no later than two years after its enactment) to enable such matters to be assessed.

14.5 Worked examples

Given the complexity of these new provisions, it would assist practitioners and others if the ACCC provided worked examples of how the PCI scheme would operate in various scenarios in practice. Three examples are provided below.

EXAMPLE 1

- The ACCC brings a proceeding against corporation X for breach of the new civil penalty prohibitions.

- In the course of its investigations the ACCC took statements from two of X’s ex-employees, Y and Z. Both subsequently have received anonymous threats.

- X is anxious to obtain access to the statements, as it believes that they are conflicting and unreliable and show the weaknesses in the ACCC’s case.

- X requests disclosure of the statements by the ACCC pursuant to s 157(1). The ACCC refuses to comply with the request pursuant to s 157(1A), taking account particularly of the factor in s 157(1B)(d) (relating to the protection or safety of informants and the need to ensure that informants are not discouraged from giving PCI to the ACCC in the future).

- Next X decides to subpoena the ACCC in an attempt to compel it to produce the statements. However, by virtue of s 157B(1) the ACCC is not to be required to produce to a court a document containing PCI except with the leave of the court.

- In deciding whether to grant leave the Court must have regard to the factors in s 157B(2) (those of particular relevance here being (a) (PCI given in confidence); (d) (safety of informants), and (e) (interests of administration of justice)).

- Under s 157B(4) the ACCC may produce the statements voluntarily but in doing so must have regard to the factors in s 157B(5) (those of particular relevance again being (a) and (d), (e)).
Say the ACCC does produce the statements voluntarily under s 157B(4). By virtue of s 157B(6), it is only entitled to adduce them in a subsequent related proceeding (for example against another participant in the cartel) provided that it exercises its power afresh under s 157B(4).

EXAMPLE 2

The ACCC is investigating conduct by Y for possible referral to the CDPP for prosecution under the new cartel offences. Y is the Australian subsidiary of a United States corporation, USY, currently also under investigation by the DOJ.

The DOJ has provided the ACCC with transcripts of information that it has secretly recorded between senior members of USY’s management and Y’s management.

Y makes a request under the Freedom of Information Act 1982 (Cth) for access to the transcripts.

The ACCC refuses to provide access, relying on various exemptions under the Freedom of Information Act 1982 (Cth) – for example, s 33 (relating to documents … affecting international relations); s 37 (relating to documents affecting enforcement of law).

Y applies to the Administrative Appeals Tribunal for review of the ACCC’s decision. By virtue of s 157B(1) it appears that the ACCC cannot be required to produce the statements or disclose the information in the statements to the tribunal unless the tribunal gives leave. In effect, the tribunal will be prevented from performing the review unless leave is given and it is able to inspect the documents to determine the applicability of the exemptions. In exercising its power to grant leave the tribunal must have regard to the matters in s 157B(2). In this instance, the matters in paras (b) (Australia’s relations with other countries) and (c) (the need to avoid disruption to national and international efforts relating to law enforcement and criminal investigation) will be particularly relevant. In relation to these factors, the Mutual Antitrust Enforcement Assistance treaty between Australia and the United States will be material – in particular, Article VI concerning the confidentiality of antitrust evidence provided under the agreement.

Alternatively the ACCC may choose to provide access to the transcripts but in so deciding the ACCC must have regard to the same factors, as set out in s 157B(5).

246 It is assumed for this purpose that “tribunal” in this context includes the AAT as the Australian Competition Tribunal is generally identified in the Trade Practices Act 1974 (Cth) as the “Tribunal” (see s 4(1)).

- The CDPP subsequently commences a prosecution against Y under the new cartel offences. Having been unsuccessful in the FOI proceeding, Y seeks to subpoena the ACCC to produce the transcripts in the criminal proceeding. By virtue of s 157B(1), the ACCC is not required to produce the transcripts unless the Court gives leave.

- The Court may only grant leave having taken into the account the same factors, set out in s 157B(2), as were taken into account by the tribunal.

- Say the Court refuses leave. Y subsequently applies for a stay of the proceeding on the ground that the refusal would have a substantial adverse effect on the hearing in the proceeding. By virtue of s 157D(3), the Court is not prevented from ordering the stay, provided it takes account of the factors in s 157D(4) (which would not be relevant here).

**EXAMPLE 3**

- M has launched proceedings against P seeking damages in respect of an alleged breach of the new civil penalty prohibitions, which is also the subject of proceedings by the ACCC.

- The ACCC has granted immunity to Q, the other participant in the cartel.

- M applies to the ACCC for copies of the documents in its possession relating to Q’s immunity application. Pursuant to s 157C(3) the ACCC may provide the documents, subject to having regard to the factors in s 157C(5) (para (a), relating to information given in confidence, being of particular relevance in this context).

- However, the ACCC refuses and M applies for an order of discovery against the ACCC as a non-party or seeks to issue a subpoena. By virtue of s 157C(1) neither of these mechanisms will be effective to require the ACCC to provide the documents and there is no provision for leave to be given for the production.

- Say the ACCC does decide to produce the documents, and the solicitors for M subsequently are retained by another ‘victim’ of the cartel, N, and bring a second separate proceeding against M by N. The documents must not be adduced in the N proceeding unless a further application is made and granted by the ACCC under ss 157C(3)-(4).

- By virtue of s 157C(6), the ACCC also cannot be required to produce the documents in its proceeding against P unless it decides to produce them voluntarily under s 157B(4) or unless leave is given by the Court under s 157B(1).
15. **JURY TRIALS**

15.1 **The new cartel offences are indictable offences triable by a jury**

The new cartel offences are indictable offences (ss 44ZZRRF(3) and 44ZZRG(4)).

Under s 80 of the *Australian Constitution*, trial by jury will be required where a prosecution for a cartel offence is brought in the Federal Court.\(^{248}\) Section 80 requires unanimous verdicts and does not allow an accused to elect trial by judge alone.\(^{249}\)

Mechanisms for jury trial in the Federal Court need to be put in place. The Exposure Draft Bill foreshadows the later enactment of the Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2008 (see s 163(6) of the Exposure Draft Bill). It is not clear why this bill was not released as part of the Exposure Draft Materials. Suitable facilities and administrative systems will also be needed.\(^{250}\)

The new cartel offences are included in the Schedule Version of Part IV of the *Trade Practices Act* 1974 (Cth). Under the Competition Policy Reform Acts in the States and Territories (see eg *Competition Policy Reform (NSW) Act* 1995 ss 24-25) a Competition Code offence under the Schedule Version of Part IV is to be treated as if a Commonwealth offence. Accordingly, it appears that s 80 of the *Australian Constitution* will apply to the new cartel offences in the Competition Code.

It also appears that the new cartel offences under Part IV (as distinct from those in the Competition Code) will be triable in States and Territories under s 68 of the *Judiciary Act* 1903 (Cth) and s 163 of the Exposure Draft Bill. Under s 68(2) of the *Judiciary Act*, trials conducted on that jurisdictional basis will be subject to s 80.

There is considerable divergence in approach under State and Territorial laws relating to the trial of indictable offences as to the permissibility of majority verdicts and the right of an accused to elect trial by judge alone:

- Majority verdicts are permissible in New South Wales, Victoria, South Australia, Tasmania, Western Australia and the Northern Territory.\(^{251}\)

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\(^{249}\) Brown v The Queen (1986) 160 CLR 171. But note Brownlee v R (2001) 207 CLR 278 (s 80 taken not to require a verdict by 12 persons where 2 jurors have been discharged).


\(^{251}\) *Jury Act* 1977 (NSW) s 55F; *Juries Act* 2000 (Vic) s 46; *Juries Act* 1927 (SA) s 57; *Juries Act* (Tas) s 43; *Juries Act* 1957 (WA) s 41; *Criminal Code* (NT) s 368.
• Indictable offences may be tried by judge alone in New South Wales, the Australian Capital Territory, South Australia and Western Australia.\textsuperscript{252}

The preservation of the protections under s 80 in the Exposure Draft Bill is commendable given the tendency to relax those protections under State and Territorial jury laws. As Chesterman observed in 1999:

\textit{The recent history of juries in Australia reveals an interesting clash between the endeavours of state and territory governments to reduce the costs associated with jury trial by various means—for example, relegating more and more cases to summary trial by magistrates, allowing for trial on indictment by judges sitting alone, and introducing majority verdicts—and the determination of the High Court of Australia, in its decisions on s 80 of the Australian Constitution, to reassert the traditional values and features of jury trial. While the scope of the High Court's efforts is circumscribed - it can only affect the trial of commonwealth offences and it appears committed to retaining its long-standing literal interpretation of the section, robbing it of much of its potential force - the Court's judgments do operate as strong reminders of the reasons why jury trial travelled from England to Australia in the first place.}\textsuperscript{253}

\subsection*{15.2 Should all trials of the new cartel offences be tried in the Federal Court?}

The fact that the new cartel offences will be triable in State and Territorial Supreme Courts under may come as a surprise.\textsuperscript{254} The Treasurer’s Press Release did not give any hint that there would be trials under State and Territorial laws. Nor was that prospect entertained in the Dawson Report (at 153). The Working Party Report may canvas the issue but that Report is not publicly available. The Budget Papers in 2006 stated:

“\textit{In addition, the Government will provide $3.9 million over four years to enable the Federal Court to hear trials relating to serious cartel conduct offences under proposed amendments to the \textit{Trade Practices Act 1974}. This includes $1.4 million in capital funding in 2006-07 for accommodation fit-out.”} \textsuperscript{255}

It may be argued that all trials for the new cartel offences should be in the Federal Court, for these main reasons:

\begin{itemize}


  \item \textsuperscript{254} Australia, Treasury, \textit{Expense Measures}, (Budget Paper No 2, Pt 2, 2006)

  \item \textsuperscript{255} Australia, Treasury, \textit{Expense Measures}, (Budget Paper No 2, Pt 2, 2006)
\end{itemize}
the experience that Federal Court judges have on Trade Practices Act 1974 (Cth) issues, including the determination of penalties for price fixing;\(^{256}\) and

the benefits of consistency and specialisation likely to flow from vesting jurisdiction in one court – as Justice Heerey commented on an earlier version of this paper:\(^{257}\)

... no reason, as far as I am aware, has been advanced for departing from the policy by which, since the introduction of the Trade Practices Act, exclusive jurisdiction has been conferred on the Federal Court in competition law matters. If appeals are to go to the Full Court of the Federal Court there seems little point in having the trials in State and Territory Supreme Courts, already over-burdened with criminal work. If appeals are to go to State and Territory Courts of Appeals there will be the potential for conflicting decisions at intermediate appellate level.

State and Territorial Supreme Courts have extensive experience with criminal jury trials and to that extent are well placed to try cartel offences. However, experience with criminal jury trials also resides in members of the Federal Court, as Black CJ has explained:\(^{258}\)

*It may not be widely appreciated that many of the Federal Court's judges have had extensive experience in criminal law and procedure, through practice as trial and appellate advocates when at the Bar and as judges hearing criminal trials and appeals on other courts. Five present members of the Court conducted criminal trials when they were formerly members of State Supreme Courts, one was a member of a Court of Appeal with extensive criminal work and another was the Commonwealth Director of Public Prosecutions. Many of the judges hold secondary commissions as members of courts with trial and appellate criminal jurisdiction: the Supreme Court of the Australian Capital Territory, the Supreme Court of Norfolk Island and the Supreme Courts of Vanuatu, Tonga and Fiji. This depth and mix of experience has informed the work of the Criminal Practice Committee as the Federal Court moves towards another chapter in its history as a court created under Chapter III of the Constitution.*

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\(^{256}\) See also Australian Law Reform Commission, *Same Time, Same Crime: Sentencing of Federal Offenders* (Report No 103, 2006), Recommendation 18-2 (“[e]xpand the original jurisdiction of the Federal Court of Australia to hear and determine proceedings in relation to nominated federal offences whose subject matter is closely allied to the existing civil jurisdiction of the Court, in areas such as taxation, trade practices and corporations”).


16. **CONCURRENT CIVIL AND CRIMINAL PROCEEDINGS**

The existence of criminal and civil liability for substantially the same conduct raises issues concerned with multiple proceedings, the prospect of double punishment, choice of investigatory powers and procedures, use of information and evidence in different proceedings, and the threat of criminal prosecution for improper purposes. Similar issues arise in and are often litigated in the context of concurrent civil and criminal proceedings for breaches of the *Corporations Act 2001* (Cth).

These issues are dealt with largely by amendments to s 76B under the Exposure Draft Bill. As indicated by its heading, s 76B aims to set out “What happens if substantially the same conduct is a contravention of Part IV … and an offence.”

The provisions in s 76B are consistent with the recommendations of the ALRC in its 2002 Report in relation to multiple proceedings and multiple penalties. As a preliminary point, however, it is relevant to note the ALRC’s warning that, given the issues raised by parallel criminal and civil penalties, the legislative scheme should distinguish clearly between the offence and the contravention, and clearly state the physical elements and the fault elements for each.

Accordingly, the default fault elements under the *Criminal Code* (Cth) (ie, intention; recklessness) that apply to ss 44ZZRF and 44ZZRG should be expressly stated, thereby clearly distinguishing the cartel offences from the civil penalty prohibitions.

### 16.1 Bars and stays on proceedings

Section 76B deals with parallel or sequential criminal and civil penalty proceedings and the risk of double jeopardy, in the present context as follows:

- There is a bar on civil proceedings for a pecuniary penalty order if a conviction is obtained in a criminal proceeding under the new cartel offences: s 76B(2).

- Civil proceedings for a pecuniary penalty order are stayed once criminal proceedings are started or where they already have been started under the new cartel offences. If the person is not convicted, the civil proceedings may be resumed but otherwise they are dismissed: s 76B(3).

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Criminal proceedings under the new cartel offences may be started regardless of whether a pecuniary penalty order in a civil proceeding has been made: s 76B(4).

“Pecuniary penalty order” means an order under s 76 for the payment of a pecuniary penalty (s 76B(1)). Hence the provisions under s 76B do not apply to proceedings for other civil orders (eg under ss 80, 86C, 86D, 86E). Thus, for example, once a criminal conviction has been obtained against a person in relation to conduct caught by the new cartel offences, the ACCC may still bring proceedings seeking a disqualification order under s 86E in respect of the same conduct.

These provisions do not limit the commencement of private enforcement actions.

16.2 Limits on use of information and evidence

Evidence of information given or documents produced by an individual is not admissible in criminal proceedings against the individual if the individual gave the information or produced the documents in proceedings for a pecuniary penalty order against the individual (whether or not the order was made): s 76B(5).

The exception to this is in a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

Again, this bar on the use of evidence in subsequent criminal proceedings does not apply in respect of evidence adduced in a civil proceeding for an order other than a pecuniary penalty order.

The protection under s 76B(5) also does not extend to information given or documents produced by a corporation. This is apparently intended to be consistent with the fact that the privilege against self-incrimination is not available to corporations. However, it may produce some anomalies. For example if the ACCC has commenced s 76 proceedings against a company and its executives and there has been discovery or statements filed, and subsequently criminal proceedings are brought thereby staying the civil proceeding, then by virtue of s 76B(5) the evidence adduced by the corporate respondents in that proceeding would be admissible in the subsequent criminal proceeding but the evidence adduced by the individual respondents would not. Questions might arise also as to admissibility of evidence in a subsequent criminal proceeding by an individual in an earlier civil proceeding where the individual on his own behalf as well as on behalf of the corporate respondent of which he is an employee gave the evidence. If s 76B(5) reflects a concern to prevent evidence in civil proceedings from being used in criminal proceedings owing, for example, to the lesser standard of proof and more relaxed rules of evidence in the former, then it is difficult to understand why the concern should apply only to the evidence of individuals, and not to the evidence of corporations.
16.3 Scope of s 76B – too narrow?

The provisions in s 76B apply where an offence is constituted by conduct that is “substantially the same” as conduct constituting a contravention of Part IV. In criminal law, “conduct” relates to the physical elements of an offence (see Part 7). In this context, the physical elements of the new cartel offences under ss 44ZZRF and 44ZZRG and the new civil penalty prohibitions under ss 44ZZRJ and 44ZZRK are the same. However, it is unclear whether the physical elements of the new cartel offences and the physical elements under the existing civil prohibition in s 45 are “substantially the same” for the purposes of s 76B. If not, the ramifications are potentially far-reaching – for example, the protections against double jeopardy in s 76B(2) and the limits on the use of information and evidence under s 76B(5) would not apply.

16.4 Guidelines required?

The Draft MOU is extremely brief on the question of concurrent criminal and civil proceedings, stating simply that “the DPP and ACCC acknowledge that some matters may warrant both criminal and civil proceedings” ([6.1]) and that they will ensure that “such matters are managed in an integrated fashion, including so that civil investigations or proceedings conducted by the ACCC do not adversely affect criminal investigation or prosecution” ([6.2]). Experience from the corporate law area shows that, in practice, the challenges for evidence-gathering and handling in the context of a dual criminal/civil enforcement regime can be significant indeed and that consequently the success of the working relationship between the ACCC and CDPP in relation to such matters will be critical.

In accordance with the ALRC’s recommendation,264 and as part of the enforcement policy and guidelines referred to in Part 11 above, the ACCC should develop and publish guidelines in relation to concurrent criminal and civil proceedings that addresses issues such as choice of proceedings, use of investigatory powers and limits on the use of evidence. It should also make it clear that the threat of criminal investigation or prosecution will not be used as a threat, impliedly or expressly, for the purposes of securing evidence or settlement in another proceeding. There is already a statement to that effect in the PPC.265


17. MAXIMUM PENALTIES

17.1 Penalties for the new cartel offences

For corporations, penalties for the offences under ss 44ZZRF and 44ZZRG are set out in subs (2) of those Parts:

(2) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:

(a) $10,000,000;

(b) if the court can determine the total value of the benefits that

(i) have been obtained by one or more persons; and

(ii) are reasonably attributable to the commission of the offence;

3 times that total value;

(c) if the court cannot determine the total value of those benefits - 10% of the corporation’s annual turnover during the 12 month period ending at the end of the month in which the corporation committed, or began committing, the offence;

For bodies corporate, other than corporations, the same penalties as are applicable to corporations apply (see s 79(1AA).

For individuals who attempt to contravene or are involved in (i.e. aid, induce, are knowingly concerned in, conspire with others in) a contravention of a cartel offence provision (defined as ss 44ZZRF and 44ZZRG: s 79(7)), the penalties are a term of imprisonment not exceeding five years or a fine not exceeding 2,000 penalty units (i.e. $220,000) or both (see s 79).\(^\text{266}\)

By virtue of s 4AA(1) of the Crimes Act 1914 (Cth) a penalty unit is $110.
17.2 Is the maximum corporate fine too low?

Currently the proposed maximum corporate fine is the same for the new cartel offences and contravention of the new civil penalty prohibitions, albeit higher than for contravention of the s 45 provisions (see Part 17). The maximum penalty is one of the key differentiators between criminal and civil prohibitions (see Part 3) and on this basis might be seen as too low. On one view the maximum fine should be higher than the maximum civil penalty so as to signify that breach of the prohibition is an offence, as distinct from a civil contravention. One option to achieve this would be to increase the maxima where the only sentence is a fine but to retain the present maxima for cases where the court imposes a probation order, a publicity order or a community service order in addition to a fine.267

That said, with the 2006 amendments,268 the proposed maximum fine is not out of step with international standards, Australia having joined a growing number of countries using a value-based/turnover approach to the calculation of fines for cartel conduct.269 On the other hand the $10m component of the maximum could be seen as too low, as compared for example with $100m in the United States.

Furthermore, in assessing the appropriateness of the fine, the other effects of a criminal prosecution and conviction for corporations should not be underestimated (eg the stigma of a criminal conviction, damage to reputation and to relationships with employees, shareholders, customers, suppliers).270

17.3 Is the maximum individual fine too low?

The proposed maximum fine appears to be too low.

First, it is less than half the maximum pecuniary penalty of $500,000 for contravention of the new and existing civil penalty prohibitions for cartel conduct, and breaches of other provisions under Part IV. This undermines the government and ACCC position that the conduct to which the offence provisions will apply is more serious than any other cartel or anti-competitive conduct dealt with by the Trade Practices Act 1974 (Cth).


Secondly, the government has offered no explanation for setting the fine so low. One explanation is that criminal conviction also attracts other adverse consequences for individuals, including the social stigma of being branded a criminal and being excluded or disqualified from certain activities.  However, such an explanation does not explain why, in cases where jail is not considered by a court to be an appropriate sentence, the maximum fine should be lower than the maximum civil penalty for the same or very similar conduct.

Thirdly, it is true that the proposed maximum of $220,000 is consistent with maxima for offences under the *Corporations Act 2001* (Cth). The *Corporations Act 2001* (Cth) provides for fines between $13,200 and $220,000 for breach of its criminal provisions (insider trading is the only offence to attract the maximum of $220,000). However, these maxima are very low and need to be reviewed. By contrast, following amendments in 2001, the maximum penalty for each of the consumer protection offences in Part VC of the *Trade Practices Act 1974* (Cth) is $1,100,000 (with the exception of s 75AZH (misleading conduct to which the Industrial Property Convention applies, for which the maximum penalty is $220,000).

Fourthly, $220,000 is extremely low by international standards. In the United States and the maximum individual penalty is $10 million and in the United Kingdom, it is unlimited.

Finally, the maximum should be set bearing in mind that traditionally Australian judges have imposed penalties for cartel conduct that fall significantly below the statutory maxima, and bearing in mind also the High Court’s direction that “careful attention [be paid] to maximum penalties”: (1) “because the legislature has legislated for them”; (2) “because they invite comparison between the worst possible case and the case before the court at the time”; and (3) “because in that regard they do provide, taken and balanced with all the other relevant factors, a yardstick.”

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271 A convicted person may be ineligible to hold an office, unable to obtain a licence to undertake certain activities, ineligible to travel to a range of countries and may be deported from Australia if not an Australian citizen.


274 *Competition Act 1985* (CN), s 45.

275 *Enterprise Act 2002* (UK), s 190.


17.4 Is the maximum jail term too low?

One significant consequence of setting the maximum jail sentence at five years is that telephone interception warrants will not be automatically available under the SD Act (see Part 12). However, questions as to the appropriate maximum jail sentence and the availability of telephone interception powers need to be clearly separated. As a matter of principle, the former should be resolved first, based on considerations such as the adequacy of the proposed maximum to reflect the seriousness of the offence and its consistency with other comparable offences. If based on such considerations, the view is that the appropriate maximum jail sentence is seven years, then it so happens that that will mean also that telephone interception powers will be available. However, if the view rather is that the appropriate maximum is five years, then the question arises as to whether telephone interception powers should be made available in connection with investigation of the new cartel offences by amendment of the TIA Act.

On balance, the proposed maximum of five years is supportable on the criterion of adequacy to deter and punish a worst case offence. It is difficult to make such assessments in the absence of any empirical evidence of the deterrent and other effects of jail sentences on this type of conduct. However, an instinctive response to the proposal is that the threat of a maximum five year jail term (with all of the other adverse consequences of a criminal conviction) will be sufficient to serve the deterrent and educative functions intended by the criminalisation of serious cartel conduct.

On the criterion of consistency, however, five years falls short of the maximum jail term for comparable offences under the Criminal Code (Cth) - for example, theft, obtaining property by deception and conspiracy to defraud a Commonwealth entity, each attracts a maximum jail term of 10 years. Money laundering offences (of particular relevance given that such offences may apply to dealings in proceeds resulting from the commission of the new cartel offences) attract penalties of up to 25 years, where the value of the money involved is $1,000,000 or more. Emphasising, the importance of maximising consistency between penalties for offences of similar kinds, the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (2004) issued by the Minister for Justice and Customs states that “where an offence is in some way comparable to an offence in the Criminal Code (Cth), the penalty under the Criminal Code...”

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279 Given that the new cartel offences will qualify as “serious offences” for the purposes of s 46 of the Telecommunications (Interception and Access) Act 1979 (Cth) (for the definition of “serious offence”, see s 5D of the Telecommunications (Interception and Access) Act 1979 (Cth)).


281 See Criminal Code (Cth) ss 131.1, 134.1 141.1.

282 See Criminal Code (Cth), s 400.3.
(Cth), the penalty under the *Criminal Code* (Cth) should generally be adopted.” It was on the basis of considering the range of comparable penalties under the *Criminal Code* (Cth), that the ACCC proposed a maximum custodial sentence of seven years for the new cartel offences in its submission to the Dawson Committee.\(^{283}\)

Notwithstanding the importance of consistency in principle, it should also be borne in mind that the comparable offences under the *Criminal Code* (Cth) are long-standing established offences with respect to which there is likely to be consensus as to the criminality of the relevant conduct. The same cannot be said confidently of serious cartel conduct.\(^{284}\) Furthermore, for comparable offences under the *Corporations Act* 2001 (Cth) – market rigging, market manipulation and insider trading – a five year maximum applies.\(^{285}\) It is also relevant that, in terms of international standards for cartel offences, the proposed maximum jail term is “middle-of-the-range”,\(^{286}\) there being countries such as the United States and Mexico with a 10 year maximum; countries such as the United Kingdom, Canada and Ireland at the same level with five years; and others below that, with maximum terms of three years (Japan) or four years (France).

It will be possible in the future to revisit the maximum jail term after there has been some experience with actual cases under the new cartel offences. It may be noted that in the United States, where the maximum jail term is 10 years, the average jail term is less than three years.\(^{287}\)

### 17.5 Cartel offences, new civil penalty prohibitions and s 45 prohibitions – should the maximum monetary penalty for corporations be different?

Section 76(1)(a) will be amended so that it applies to contraventions of any of the provisions of Part IV (by implication, including the new civil penalty prohibitions), “other than ss 44ZZRF and 44ZZRG” (i.e. the new cartel offence provisions).

For corporations, the maximum pecuniary penalty for contravention of the s 45 provisions, as stipulated in s 76(1A)(b), remains the same – as amended in 2006, reflecting the recommendations made in the Dawson Report.\(^{288}\)


\(^{285}\) *Corporations Act* 2001 (Cth), ss 1041A-C; s 1043A.


\(^{287}\) See Barnett, T, Spring 2007 Update for the United States Department of Justice Antitrust Division, under the heading "Increased Emphasis on Jail Sentences for Individuals", [http://www.usdoj.gov/atr/public/222725.htm](http://www.usdoj.gov/atr/public/222725.htm) viewed 14 February 2008, observing that the average jail sentence imposed for price fixing conspiracies is 27.3 months.

\(^{288}\) *Trade Practices Legislation Amendment Act (No. 1)* 2006.
For corporations, the same maximum pecuniary penalty is proposed for the new cartel offences, as set out in ss 44ZZRF(2) and 44ZZRG(2), and for contravention of the new civil penalty prohibitions, as set out in s 76(1A)(aa). The penalty formulation in these provisions is similar to the maximum pecuniary penalty for contravention of the s 45 provisions, as stipulated in s 76(1A)(b), but with certain subtle differences. The differences are discernible by comparing s 76(1A)(aa)(ii) and s 76(1A)(b)(ii).

- For contravention of the civil penalty prohibitions, under s 76(1A)(aa)(ii), the question is whether the court can determine “the total value of the benefits that have been obtained (within the meaning of Division 1 of Part IV) by one or more persons and that are reasonably attributable to the act or omission”, in which case the maximum is three times that total value (assuming it is greater than $10m). The same formula applies to the corporate penalty for the new cartel offences (see ss 44ZZZRF(2), 44ZZRG(2)).

- For contravention of the s 45 provisions, under s 76(1A)(b)(ii), the question is whether the court can determine “the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission”, in which case the maximum is three times that total value (assuming it is greater than $10m).

The effects of the differences between these two provisions appear to be that for the new civil penalty prohibitions (and the new cartel offences), the court can calculate the maximum by summing the benefits obtained by all or any of the participants in the cartel and “obtaining” of a benefit includes obtaining it for another person or inducing a third person to do something that results in another person obtaining it (s 44ZZRG). By contrast, for the s 45 provisions, the maximum is to be calculated by reference only to the value of the benefit obtained by the body corporate (or any of its related body corporate) that contravened the provision. This difference is controversial. It is not clear why the more extensive approach to penalty assessment should apply to the new cartel offences and new civil penalty prohibitions but not the existing civil penalty prohibitions in s 45.

The effect of ss 76(3) and (4) is that where conduct contravenes the civil penalty prohibitions and the s 45 prohibitions, a person is not liable to more than one pecuniary penalty under s 76 in respect of the same conduct, but for the purposes of calculating that penalty the maximum will be the highest of the limits set in ss 76(1A)(aa) and (b).

### 17.6 Is s 77A to be extended?

Section 77A currently prohibits indemnification by a body corporate of an officer in respect of a civil liability incurred under the Act and any legal costs incurred in proceedings in which the
liability is imposed. This section should be amended to prohibit indemnification in respect of criminal fines and legal costs incurred in defending a prosecution.

17.7 Time limits

There is no time limit for commencing a prosecution under the new cartel offences. This is consistent with the general position that time limits do not apply to indictable offences289 (cf s 79(6) applying a three year time limit to prosecutions for offences against Part VC, such offences being summary offences).290

For proceedings under the new civil penalty prohibitions, the time limit of six years currently applicable to any proceeding brought under s 76 will apply (see s 77).

17.8 Retrospectivity

The new cartel offence and civil penalty prohibition relating to making a CAU (ss 444ZZRF(1); 44ZZRJ(1)) will apply only to CAUs made after the commencement of the amending legislation.

Significantly, however, the new cartel offence and civil penalty prohibition relating to giving effect to a cartel provision (ss 444ZZRG(1); 44ZZRK(1)) will apply to CAUs made before the commencement of the amending legislation (see 444ZZRG(3); 44ZZRK(2).

17.9 Sentencing guidelines?

The Exposure Draft Materials make no mention of sentencing under the new cartel offences. Sentencing, including the matters to which courts must have regard when passing sentence, will be governed by Part IB of the Crimes Act 1914 (Cth). In 2006 the ALRC called for extensive reforms in relation to the sentencing of federal offenders.291 If adopted, these reforms would affect sentencing under the new cartel offences. In other jurisdictions there are sentencing guidelines that relate to sentencing for serious cartel conduct and other antitrust offences292. A study should

289 The new cartel offences will be indictable offences: ss 44ZZRF(3), 44ZZRG(3).
290 See 4H(b) of the Crimes Act 1914 (Cth).
be undertaken into whether similar guidelines would be of value in connection with sentencing under the new cartel offences.\textsuperscript{293}

18. CONCLUSION

The Exposure Draft Materials raise many issues of law and policy, as canvassed in this paper and as summarised in Part 1.

The future is unclear. The possible options for Treasury and the Minister include:

(1) proceeding with the Exposure Draft Bill and Draft MOU with minor amendments so as to save the appearance of public submissions having been taken into account;

(2) proceeding with the Exposure Draft Bill and Draft MOU with amendments that address what are arguably the most important problems by:

   (a) removing the concept of dishonesty from the definition of the new cartel offences (see Part 6 above);

   (b) tightening up the fault elements for the new cartel offences and making the fault elements explicit in the definition of the offences (see Part 7 above);

   (c) avoiding the strictness of vicarious responsibility under the new cartel offences by making a defence of reasonable precautions available to individual and corporate defendants (see Parts 8 and 9 above);

   (d) revising the scope and definition of exemptions and defences, at least to the extent of making the new cartel offences subject to: (a) a joint venture defence applying to incorporated and unincorporated joint ventures; and (b) an exemption corresponding to the exclusive dealing exemption under s 45(6) – (see Part 10 above); and

   (e) expanding and enhancing the Draft MOU, particularly as it relates to the question of immunity (see Parts 11 and 13 above);

while at the same time urging the ACCC and CDPP to ensure that upon the enactment of the legislation, they are ready to release guidelines (including worked examples) that explain the practical operation of the new regime (in the areas referred to in this paper and as summarised in Part 1);

(3) requiring Treasury to publish the submissions made to it on the Exposure Draft Materials and to publish a discussion paper that:
(a) reviews in detail the submissions made on the Exposure Draft Materials and the reasons for adopting or not adopting the main points made in those submissions;

(b) sets out the nature of and reasons for any specific changes to the Exposure Draft Bill and Draft MOU proposed by Treasury; and

(c) is accompanied by an opinion from a senior counsel experienced in Part IV matters as to the analytical integrity of the information set out in (a) and (b) above and the practicality of any proposals or recommendations made in (a) and (b);

(4) refer the Exposure Draft Materials to the Australian Law Reform Commission for fuller consultation and re-assessment.

Option (1) is unattractive, partly because the problems raised by the Exposure Draft Bill and Draft MOU will not evaporate and, unless rectified, are likely to result in a steady flow of objections from the business sector and ultimately may undermine the enforcement and deterrent impact of the criminal regime.

Option (2) is a pragmatic possible response that would avoid delay and tackle what may be seen as the most serious issues, while at the same time providing the legal profession and business community with reassurance that guidance will be forthcoming in the near future as to the intended practical operation of the regime.

Option (3) would be consistent with Treasury’s published approach to Community Consultation and would be much more comprehensive and effective than Option (2). However, it should not delay work on production of the guidelines referred to in Option (2).

Option (4), while desirable in terms of independence, extent of consultation and thoroughness, would delay the criminalisation of serious cartel conduct considerably. The Government seems unlikely to break, and indeed should be encouraged to keep, its election promise to introduce the criminalising legislation in its first year.

ANNEXURE
Four Year Rolling Average of Corporate Penalties in Australian Cartel Cases

<table>
<thead>
<tr>
<th></th>
<th>No. of penalties in 4 year period</th>
<th>Median (07 dollars)</th>
<th>Mean (07 dollars)</th>
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<tr>
<td>1994-97</td>
<td>25</td>
<td>655,259</td>
<td>2,024,682</td>
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<tr>
<td>1995-98</td>
<td>26</td>
<td>659,110</td>
<td>2,089,338</td>
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</tr>
</tbody>
</table>

Source: Dr C Beaton-Wells, The University of Melbourne, based on 1994-2007 Federal Court of Australia Decisions
Commentary on the Paper of Brent Fisse and Caron Beaton-Wells

G K Chesterton once observed that murder is not committed in a fit of absence of mind. The same can be said of price-fixing – a term which I shall use as also including other forms of cartel offences.

The controversial element in the Draft Exposure Bill of an “intention dishonestly to obtain a gain”, that is to say, as defined in the Bill, “dishonest according to the standards of ordinary people” and known by the defendant to be so, necessarily assumes that the defendant has an intention to fix prices.

If price-fixing is considered, as I think it should be, sufficiently damaging to the community to be designated a crime, then proof of intentional engagement in price-fixing – established beyond reasonable doubt – should be enough to convict a defendant.

The element of dishonesty opens up an infinite field of subjective and value-laden factors which logically should be considered pre-prosecution, as part of prosecutorial discretion, or post-conviction, as matters going to assessment of penalty.

The United States position is encapsulated in a jury direction which was upheld by the Court of Appeals for the Ninth Circuit in United States v Alston 974 F.2d 1206 (1992) at 1210:

Under the Sherman Act, price fixing is per se illegal. If you find there was a conspiracy to fix co-payment fees, it does not matter why the fees were fixed or whether they were too high or too low; reasonable or unreasonable; fair or unfair. It is not a defence to price fixing that the defendants may have had good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results.
The direction in *Alston* gives us a useful glimpse into the kind of issues that would inevitably arise in criminal trials for price fixing were a dishonesty element to be introduced. It is hard to argue with the proposition that a person is not dishonestly obtaining a gain if he or she thinks a price (albeit a fixed one) is reasonable and fair. Certainly one would expect defence counsel to put such a proposition to juries. What is a jury to take as reasonable or unreasonable or fair or unfair? Presumably the jury would have to be satisfied beyond reasonable doubt that the defendant did not actually believe that the prices were reasonable or fair and knew that “ordinary people” would not believe them to be reasonable or fair.

Who are “ordinary people” for these purposes? If they are hypothetical consumers of the goods or services in question, they might be thought to be not disinterested. Ordinary motorists might think that anything above a dollar a litre for petrol was not fair and reasonable. If they are merely representatives of the community at large, are they to be treated as a kind of de facto hypothetical Prices Justification Tribunal? On either view, one would expect evidence to be called as to the fairness and reasonableness of prices, including expert evidence of accountants and economists (and not just “ordinary” ones). Evidence as to whether a price was in fact fair and reasonable (or not) would be relevant on the question whether a defendant honestly believed it was.

The Discussion Paper passes over the American experience somewhat airily. The Sherman Act approach is considered to be possibly not desirable as it undermines the potential deterrent and educative value of a criminal offence by failing to highlight the particular wrongdoing to be the subject of criminal (as opposed to civil) sanction.

The US has had criminal sanctions for price-fixing since 1890. For most, if not all, of that period, the US has had the world’s largest free-market economy. For a considerable part of that period the US Federal Government has been in the control of the Republicans, a party not philosophically disposed to being tough on business. Nevertheless a criminal anti-trust regime, devoid of any dishonesty requirement, has been enforced vigorously. The US experience ought to carry a lot of weight.

If price fixing is made a crime, conviction and punishment in itself will be sufficient to establish “deterrent and educative value”. The fate of a businessman with a home in Hawthorn or Brighton, a flat at Mt Buller and children at Xavier or Carey, who is compelled to spend two or three years
locked up with murderers, rapists and drug dealers, should have substantial deterrent and educative value for persons minded to commit like offences.

The notion of dishonesty as an element of a criminal offence of price fixing should be quietly deposited in that file labelled “Interesting Ideas”.

Three further brief comments. The exercise of prosecutorial discretion will be critical. Underlying the present proposal is the explicit policy decision that there will be some cases where there is available evidence which could probably support a conviction but nevertheless, for a variety of reasons, there should not be a prosecution. This is quite foreign to the traditional criminal justice approach for offences which, by their very nature, are considered serious – as price-fixing undoubtedly is.

There will be difficult decisions, for example should there be prosecution of a price-fixing which is relatively small and restricted in economic impact but conducted flagrantly and with aggravating circumstances, such as, for example, intimidation? And at the other end of the scale there might be price fixing with national impact but not very strong evidence, so that proceeding for a civil penalty might be the safer option. And if that course is taken will the ACCC or DPP or both be attacked for “going soft”?

These sort of problems are inevitable. The reality is that they cannot be solved in advance by memoranda of understanding, however comprehensive.

Secondly, no reason, as far as I am aware, has been advanced for departing from the policy by which, since the introduction of the Trade Practices Act, exclusive jurisdiction has been conferred on the Federal Court in competition law matters. If appeals are to go to the Full Court of the Federal Court there seems little point in having the trials in State and Territory Supreme Courts, already over-burdened with criminal work. If appeals are to go to State and Territory Courts of Appeals there will be the potential for conflicting decisions at intermediate appellate level.

Finally, the Bill is extremely complicated. Experience shows that often the more legislation tries to cover every eventuality, the more unanticipated situations will arise, creating uncertainty and points for litigious disputation. Often the solution is an even more complicated amendment.

Drafting by committee is something to be avoided – still less by a meeting like the present one. However, merely by way of suggestion, I wonder whether it might be a better course simply to
provide that conduct which presently constitutes a price-fixing contravention also constitutes an offence if proved beyond reasonable doubt. In other words, the approach of the Sherman Act, if not its language.

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