

# **AUSTRALIA'S CRIMINALIZATION OF CARTELS WILL IT BE CONTAGIOUS?**

**Caron Beaton-Wells**

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## **About the author**

**Caron Beaton-Wells** is an Associate Professor and the Director of Studies for Competition Law at the Melbourne Law School, University of Melbourne. She is published widely in the area, including the text, *Proof of Antitrust Markets* (Federation Press, 2003) based on her doctoral research. More recently her research on the criminalization of cartel conduct has led to articles published in leading national and international competition law journals, and she has been awarded a major Australian Research Council grant to conduct a multidisciplinary empirical project on criminalisation, together with researchers from the disciplines of regulation, criminology and economics. Dr Beaton-Wells teaches and oversees a specialty graduate program in competition law, in which she co-teaches the subject, *Enforcing Competition Law*. She is a regular speaker at competition law conferences and comments in the media on competition law issues. Dr Beaton-Wells is a member of the Trade Practices Committee of Australia's peak legal body, the Law Council of Australia. She is a founding member of the Academic Board of the Asian Competition Law and Economics Centre and a member of the American Bar Association's Sections of Antitrust law and International Law. She has been a barrister since 1997, and prior to that, was a solicitor at Mallesons Stephen Jaques. Dr Beaton-Wells has been elected a Visiting Fellow of the Oxford Centre for Competition Law and Policy and St John's College in 2009. Caron Beaton-Wells can be contacted at [c.beaton-wells@unimelb.edu.au](mailto:c.beaton-wells@unimelb.edu.au).

# AUSTRALIA'S CRIMINALIZATION OF CARTELS SHOULD IT BE CONTAGIOUS?

Australia has caught the cartel criminalization bug but in doing so has developed its own distinctive strain. The development of Australia's new cartel regime has been characterized by political prevarication and compromise. The outcome exhibits legislative overreach and complexity, as well as enforcement bifurcation and excessive discretion. To a certain extent, these ailments suggest that the consensus in support of criminalization in Australia is weak. However, they are also in part symptoms of Australia's approach to antitrust legislation and enforcement generally and thus the risk of infection by other jurisdictions contemplating criminalization is likely to be low. That said, analysis of the Australian experience does provide some insight into how other countries might avoid the protracted delay and divisiveness that has plagued and is likely to continue to undermine the potentially positive impact of criminalization in this country.

## 1. Introduction

The international movement in favour of criminal sanctions for 'serious' cartel conduct over the last decade has been well-documented.<sup>1</sup> In 2009, Australia will become the latest convert in the campaign led by the United States over the last decade to have this type of anti-competitive activity seen and dealt with as a crime.<sup>2</sup> Australia's conversion may be taken as further evidence of 'common ground' if not convergence in both substantive antitrust law and enforcement strategy with respect to cartel conduct. However, it should be seen as commonality or convergence at the highest level of generality or abstraction only.<sup>3</sup> As described in this paper, the Australian experience supports equally the view that the approach taken by a particular country in deciding whether to criminalize and, if so, how to define and enforce a cartel offence is likely to be distinctive in various respects. There will be multiple complex forces at work in such matters. A full appreciation of their influence and interaction will transcend orthodox legal and economic analysis and require insight from at least the disciplines of political science, sociology, regulation, organizational behaviour, psychology and history.

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<sup>1</sup> The trend is usefully charted in C Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Cartels' (2006) 14 *Critical Criminology* 181. See also G Spratling and D Jarrett, 'Making the Decision: What to Do When Faced with International Cartel Exposure: Developments Impacting the Decision in 2009' (Paper presented at the Federal Court of Australia – Law Council of Australia Workshop, Adelaide, 3-4 April 2009) (copy on file with author).

<sup>2</sup> Upon the passage of the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 which will add a new Div 1 to Trade Practices Act 1974 (Cth), Pt IV (TP Act) providing for cartel offences (see ss 44ZZRF-44ZZRG).

<sup>3</sup> Perhaps as general as the principle that competition law should be effectively enforced: one of the 11 'emerging principles of international competition law' identified in C Noonan, *Emerging Principles of International Competition Law* (Oxford University Press, 2008) 566.

This paper does not attempt to map exhaustively the various factors or actors that have influenced the Australian criminalization project to date.<sup>4</sup> Instead it focuses on three particular aspects or issues that have marked the process over the last eight years:

- political prevarication and compromise (see section 3);
- legislative overreach and complexity (see section 4); and
- enforcement bifurcation and excessive discretion (see section 5).

It is not asserted that any or all of these facets are unique to the Australian experience or that they will not feature to the same extent in criminalization debates in other jurisdictions. However, an understanding of each and their interplay are central to understanding both the process by which the decision to criminalize was made in Australia and also the outcome of that process in terms of the statutory scheme and enforcement policy that have been established. Going forward, these factors will continue to be influential in the implementation of the new cartel regime and in determining whether it delivers on the promise of greater deterrence of serious cartel conduct in the Australian economy.<sup>5</sup>

It is concluded that Australia's decision to criminalize serious cartel conduct may prove infectious, at least to some countries that are geographically, economically, socially and legally proximate to Australia. However, those countries may be advised to approach criminalization in such a way that vaccinates them from the pathology infecting Australia's new criminal cartel regime.<sup>6</sup> A degree of immunity may be secured by ensuring that definitional and enforcement issues are examined in detail early on,

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<sup>4</sup> That 'mapping' is being undertaken by the author as part of a large research project on cartel criminalization funded over three years by the Australian Research Council. The project website is at <http://www.cartel.law.unimelb.edu.au>.

<sup>5</sup> Enhanced deterrence has been the principal justification for criminalization in Australia: see Commonwealth, *Parliamentary Debates*, House of Representatives (3 December 2008) 12310 (C Bowen, Minister for Competition Policy and Consumer Affairs, and Assistant Treasurer), at [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=1;query=Title%3Acartel%20Database%3Achamber%20Title%3A%22second%20reading%22%3F%20%20Context\\_Phrase%3Abill%3F%20Speaker%3A%3F;querytype=:rec=12;resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=1;query=Title%3Acartel%20Database%3Achamber%20Title%3A%22second%20reading%22%3F%20%20Context_Phrase%3Abill%3F%20Speaker%3A%3F;querytype=:rec=12;resCount=Default), last viewed 29 May 2009; Australian Competition and Consumer Commission, 'Submission to the Trade Practices Act Review Committee' (June 2002), at <http://tpareview.treasury.gov.au/submissions.asp>, last viewed 29 May 2009; Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) 163 (Conclusions point 2), 164 (Recommendation 10.1), at <http://www.tpareview.treasury.gov.au/content/report/downloads/PDF/Chpt10.pdf>, last viewed 29 May 2009.

<sup>6</sup> See C Beaton-Wells and B Fisse, 'The Cartel Offences: An Elemental Pathology' (Paper presented at the Federal Court of Australia – Law Council of Australia Workshop, Adelaide, 3-4 April 2009).

preferably at the same time that the general question of whether to criminalize is considered.

It may be useful first to outline the key tenets of Australia's new cartel regime.

## 2. The new cartel regime

Australia's long-standing civil prohibitions on cartel conduct are in s 45 of the Trade Practices Act 1974 (TP Act). Section 45 covers not only 'contracts' but also 'arrangements' and 'understandings', to which at least two of the parties must be competitors. The terms 'contract', 'arrangement' and 'understanding' have been interpreted as representative of a spectrum of consensual dealings,<sup>7</sup> ranging from the most formal and explicit at the 'contract' end to the most informal and implicit at the 'understanding' end.<sup>8</sup> No significant distinction has been drawn between an 'arrangement' and an 'understanding' and, importantly, recent cases have confirmed that both require an undertaking of some form of commitment or obligation by one or more of the parties.<sup>9</sup> In an attempt to widen the scope of the prohibition to address tacit collusion, the Australian Competition and Consumer Commission (ACCC) has proposed amendments to remove commitment as a condition of establishing an 'understanding'.<sup>10</sup> That proposal has been criticized heavily by commentators and is under consideration by the Australian government.<sup>11</sup>

The focus of the prohibition is on a provision contained in the contract, arrangement or understanding. Per se liability has attached to a price fixing provision<sup>12</sup> or an exclusionary provision.<sup>13</sup> Otherwise the provision must be shown to have the purpose, effect or likely effect of substantially lessening competition in a market within

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<sup>7</sup> *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 331 [24].

<sup>8</sup> See generally I Tonking, 'Belling the CAU: Finding a substitute for "understandings" about Price' (2008) 16 Competition & Consumer LJ 46; I Wylie, 'Understanding "understandings" under the Trade Practices Act – an enforcement abyss?' (2008) 16 Trade Practices LJ 20; W Pengilley, 'What is required to prove a "contract, arrangement or understanding"?' (2006) 13 Competition & Consumer LJ 14.

<sup>9</sup> See *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452, 464 [47]; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 335 [37].

<sup>10</sup> See Australian Competition and Consumer Commission, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol* (December 2007) 228-289, at <http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf>, last viewed 29 May 2009.

<sup>11</sup> The Discussion Paper by Treasury and submissions received on it are available at <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1459>, last viewed 29 May 2009.

<sup>12</sup> As defined in TP Act, s 45A.

<sup>13</sup> As defined in TP Act, s 4D.

Australia.<sup>14</sup> It has been a contravention either to make a contract, arrangement or understanding containing such a provision or to give effect to such a provision contained in a contract, arrangement or understanding.<sup>15</sup>

The amendments brought about by the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (CC & OM Bill) will establish a new Division in the TP Act specific to cartels.<sup>16</sup> It will contain both cartel offences and a new set of parallel civil per se prohibitions. The general provisions of s 45 will remain, although the per se prohibition on price fixing will be removed as this will be the subject of one of the new per se prohibitions.

The new offences and civil per se prohibitions will reflect the 1998 Organisation for Economic Co-operation and Development's *Recommendation of the Council concerning Effective Action against Hard-Core Cartels* in that they will be addressed to four types of provision, broadly categorised as involving price fixing, output restriction, market allocation and bid rigging.<sup>17</sup> These types of provisions are to be classified as 'cartel provisions'.<sup>18</sup> Once the 2009 Bill is passed, it will be an offence (subject to proof of the fault elements referred to below) or a civil per se violation to make a contract, arrangement or understanding that contains a cartel provision or to give effect to a cartel provision contained in a contract, arrangement or understanding.<sup>19</sup> The only difference in the elements of the offences and the civil prohibitions is that the former will require the proof of certain mental (fault) elements generally associated with criminal provisions, namely the intention to make a contract or arrangement or arrive at an understanding, or to give effect to a cartel provision with the knowledge or belief that the cartel provision is contained in a contract, arrangement or understanding.<sup>20</sup>

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<sup>14</sup> See TP Act, ss 45(2)(a)(ii), 45(2)(b)(ii).

<sup>15</sup> See s 45(2)(a) for the making prohibition and s 45(2)(b) for the giving effect prohibition. 'Give effect to' in relation to a provision of a contract, arrangement or understanding is defined broadly to include to 'do an act or thing in pursuance of or in accordance with or enforce or purport to enforce' (see TP Act, s 4(1)).

<sup>16</sup> Part IV Div 1, that being the Part of the TP Act that contains the core prohibitions on anti-competitive conduct. Part IV Div 2 will contain s 45 and the other prohibitions on mergers and acquisitions, misuse of market power and vertical restraints in ss 46-50.

<sup>17</sup> Organization for Economic Co-operation and Development, *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, C(98)35/FINAL (14 May 1998) 3, at <http://www.oecd.org/dataoecd/39/4/2350130.pdf>, last viewed 29 May 2009.

<sup>18</sup> As defined in proposed TP Act, s 44ZZRD.

<sup>19</sup> Despite the fact that the amendments will not be retrospective, there is no temporal limitation on the idea of giving effect in this context (see the definition referred to in n 15 above). Conceivably therefore it could catch conduct that gives effect to an agreement reached in the distant past.

<sup>20</sup> Under the Criminal Code Act 1995 (Cth) (Criminal Code) an offence consists of physical elements and fault (mental) elements. The physical elements of the cartel offences are respectively: the making of a

There is a range of exceptions, exemptions and defences that will apply to conduct that otherwise would be subject to the new statutory prohibitions, criminal and civil.<sup>21</sup> Exemption or immunity may be obtained for provisions in contracts, arrangements or understandings on a case-by-case basis through the long-standing authorization or notification processes in Pt VII of the TP Act.<sup>22</sup> Notification in this context is available only for collective bargaining and then only for contracts where it is expected that the total value of the transactions under the contract over a 12-month period will not exceed AU\$3 million (or higher amounts as set by regulations).<sup>23</sup> In addition, pre-existing exemptions from the per se prohibition on price fixing will continue for provisions in relation to the price of goods or services to be collectively acquired or for the joint advertising of the price for the re-supply of goods or services collectively acquired.<sup>24</sup>

Exemptions also aim to prevent overlap between the various prohibitions under the TP Act. For example, if there is an agreement that involves a vertical exclusive dealing or resale price maintenance provision, then there are exemptions that remove it from the per se compass of the cartel prohibitions and allow it to be dealt with under the prohibitions specific to such restraints.<sup>25</sup> The same applies to provisions for the purchase of shares or assets which are to be dealt with under the general merger and acquisition prohibition under s 50.<sup>26</sup>

The main exception to the cartel offences and new civil prohibitions will be for joint venture activity. This exception will be confined to contracts that relate to the joint production and supply of goods or services.<sup>27</sup> By contrast, the exception for the existing civil prohibition on exclusionary provisions is for contracts, arrangements and

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contract or arrangement or arriving at an understanding that contains a cartel provision (for the offence in s 44ZZRF); or the giving effect to a cartel provision contained in a contract, arrangement or understanding (for the offence in s 44ZZRG). The fault elements of the cartel offences are both implied as a result of the operation of the Criminal Code (intention) as well as expressly indicated in the offence provisions themselves (knowledge or belief).

<sup>21</sup> See proposed TP Act, Pt IV Div 1 sub-Div D.

<sup>22</sup> See the exceptions for conduct notified and cartel provisions subject to a grant of authorization in proposed TP Act, ss 44ZZRL-44ZZRM.

<sup>23</sup> See TP Act, ss 93AB-93A. The collective bargaining notification procedure was introduced in 2007 as a concession to small business, in accordance with a recommendation by an independent review committee in 2003: see Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) ch 7, at <http://www.tpareview.treasury.gov.au/content/report/downloads/PDF/Chpt7.pdf>, last viewed 29 May 2009.

<sup>24</sup> See proposed TP Act, s 44ZZRV.

<sup>25</sup> See proposed TP Act, ss 44ZZRR-44ZZRS.

<sup>26</sup> See proposed TP Act, s 44ZZRU.

<sup>27</sup> See proposed TP Act, ss 44ZZRO-44ZZRP. A person will not be entitled to rely on the defence in relation to the cartel offences unless they have given the prosecutor certain information within 28 days after the day of committal for trial (see proposed s 44ZZRO(2)).

understandings for the purpose of a joint venture that do not have the purpose or effect of substantially lessening competition.<sup>28</sup> The rationale for not including the issue of competitive effects in the exception for the cartel offences appears to have been that juries should not have to cope with an analysis of effects on competition.<sup>29</sup>

A dual criminal/civil regime with wide ranging offences and prohibitions and substantial overlap between them means that policy and enforcement outcomes will depend on the exercise of prosecutorial discretion by enforcement agencies. Those agencies are the body responsible for the enforcement of the TP Act, the ACCC, and the general centralized prosecutions agency that has responsibility for prosecutions of all indictable federal offences in Australia, the Commonwealth Director of Public Prosecutions (DPP).<sup>30</sup>

The roles of and relationship between these agencies in the context of the new cartel regime have been outlined in a Memorandum of Understanding (ACCC/DPP MOU).<sup>31</sup> As set out in the ACCC/DPP MOU, the ACCC is responsible for investigating cartel conduct and gathering evidence, managing the immunity process in consultation with the DPP, and referring serious cartel conduct to the DPP for consideration for prosecution.<sup>32</sup> The DPP is responsible for prosecuting the cartel offences in accordance with the DPP's *Prosecution Policy of the Commonwealth*, and seeking associated remedies, including under 'proceeds of crime' legislation.<sup>33</sup>

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<sup>28</sup> See TP Act, s 76C.

<sup>29</sup> See Parliament of Australia, Senate, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Supplementary Explanatory Memorandum, [1.4].

<sup>30</sup> The Office of the Commonwealth Director of Public Prosecutions (DPP) is established under the Director of Public Prosecutions Act 1983 (Cth). The Office is headed by a Director, who is appointed for a statutory term of up to seven years. While within the portfolio of the Commonwealth Attorney-General, the DPP operates independently of the Attorney-General and of the political process. There is also independence between the DPP and referring agencies (the Australian Federal Police or a regulatory agency such as the ACCC or the Australian Securities or Investments Commission). The DPP has no investigation power or function. The decision to investigate matters and the decision to refer matters to the DPP is a decision for the referring agency. It is the role of the DPP to decide whether to prosecute based on the brief provided by the referring agency and to carry out the prosecution. See further <http://www.cdpp.gov.au>.

<sup>31</sup> *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* (2008), at <http://www.cdpp.gov.au/Media/Releases/20081201-ACCC-and-CDPP-Cartel-Conduct-Immunity-MOU.pdf>, last viewed 29 May 2009.

<sup>32</sup> *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* (2008) [2.2]-[2.3], at <http://www.cdpp.gov.au/Media/Releases/20081201-ACCC-and-CDPP-Cartel-Conduct-Immunity-MOU.pdf>, last viewed 29 May 2009.

<sup>33</sup> *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* (2008) [2.2]-[2.3], at <http://www.cdpp.gov.au/Media/Releases/20081201-ACCC-and-CDPP-Cartel-Conduct-Immunity-MOU.pdf>, last viewed 29 May 2009.

The ACCC will retain its coercive information gathering powers for the purposes of criminal investigations.<sup>34</sup> It may also draw on its entry, search and seizure powers and these are being broadened by the CC & OM Bill.<sup>35</sup> In addition, for criminal investigations, the ACCC will have new surveillance and telecommunications interception powers that it is likely to use in joint operations with the Australian Federal Police.<sup>36</sup>

Both corporations and individuals may be liable for cartel offences under the TP Act. Individuals may be liable either as primary offenders or as accessories to an offence committed by a corporation.<sup>37</sup> For corporations, upon conviction, the maximum fine is the same as applies for a civil contravention, that is, the greatest of AU\$10 million; three times the total value of benefits reasonably attributable to the offence; or if the total value of benefits is unascertainable, 10 per cent of the corporation's annual turnover over a 12-month period ending at the end of the month in which the corporation committed or began committing the offence.<sup>38</sup> For individuals, conviction for a cartel offence exposes them to a maximum fine of AU\$220,000 and/or a maximum term of 10 years' imprisonment.<sup>39</sup> A range of other orders may be made, the most significant of which from an individual's perspective is the possibility of a disqualification order.<sup>40</sup>

Provision has been made for bars on proceedings and use of evidence to deal with double

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<sup>34</sup> See TP Act, s 155.

<sup>35</sup> See TP Act, Pt XID.

<sup>36</sup> M Bezzi, 'The conduct of cartel litigation: The ACCC enforcement perspective on serious cartels – some key issues and practical considerations' (Paper presented at the Competition Law Conference, Sydney, 23 May 2009) 6.

<sup>37</sup> As the TP Act is a Commonwealth law that regulates corporations in accordance with the Commonwealth's constitutional powers, primary liability for contraventions of the Act rests with corporations. For the purposes of this liability, the conduct and mental state of directors, employees or agents is imputed to the corporation provided they were acting within actual or ostensible authority. Individuals or non-corporate entities such as unincorporated associations or partnerships may attract primary liability under the application legislation of the States and Territories (the Competition Code) if they breach any of the prohibitions in that legislation. However, individuals may also attract ancillary (accessorial) liability in relation to the conduct of the corporation of which they are a director, employee or agent. Ancillary liability arises, for example, where an individual aids, abets, induces or is knowingly concerned in contravening conduct. The standard for such liability is knowledge of the essential facts.

<sup>38</sup> See proposed TP Act, ss 44ZZRF(3), 44ZZRG(3). However, there are subtle differences between the penalty provisions that apply to the civil prohibitions under s 45 and those that apply to the new offences and civil per se prohibitions in Division 1. The effects of the differences between these appear to be that for the new prohibitions 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.

<sup>39</sup> See proposed TP Act, s 79.

<sup>40</sup> See TP Act, s 86E (and proposed s 44ZZRI).

jeopardy concerns under a regime that applies civil and criminal liability for substantially the same conduct.<sup>41</sup> However, as discussed in section 5 below, despite the obvious implications for evidence collection and investigatory techniques,<sup>42</sup> as well as ultimate outcomes, minimal guidance has been offered so far on how decisions will be made as to whether a matter will be pursued as a criminal or a civil case.<sup>43</sup>

While the Federal Court of Australia has primary jurisdiction to determine cases brought under the TP Act,<sup>44</sup> for constitutional reasons relating to Australia's federal system, State and Territory courts traditionally have dealt with all criminal offences, including offences under Commonwealth legislation.<sup>45</sup> In a further significant development associated with Australia's criminalization of serious cartel conduct, jurisdiction to deal with indictable criminal offences is to be conferred upon the Federal Court for the first time to enable it to hear cartel trials.<sup>46</sup> As indictable offences, the constitutionally guaranteed right to a jury trial will apply,<sup>47</sup> and unanimous verdicts based on proof beyond a reasonable doubt will be necessary for conviction.

### 3. Political prevarication and compromise

Since at least the mid-1990s, competition policy in broad terms has enjoyed bipartisan support in Australia, as well as support at both the Commonwealth (federal) and State and

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<sup>41</sup> See proposed TP Act, s 76B which will impose a bar on civil proceedings for a pecuniary penalty order if a conviction is obtained in a criminal proceeding under the new cartel offences. Civil proceedings for a pecuniary penalty order will be stayed once criminal proceedings are started or where they have been started already under the cartel offences. If the person is not convicted, the civil proceedings may be resumed but otherwise they are dismissed. Further, criminal proceedings under the new cartel offences may be started regardless of whether a pecuniary penalty order in a civil proceeding has been made. These provisions do not limit the commencement of private enforcement actions. 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).

<sup>42</sup> As acknowledged in Australian Competition and Consumer Commission, 'Submission to the Trade Practices Act Review Committee' (June 2002) 51-52, at <http://tpareview.treasury.gov.au/submissions.asp>, last viewed 29 May 2009.

<sup>43</sup> Cf Canadian Competition Bureau, *Draft Competitor Collaboration Enforcement Guidelines*, at [http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf/\\$FILE/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf](http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf/$FILE/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf), last viewed 29 May 2009, that have been published for comment.

<sup>44</sup> See TP Act, s 86(1).

<sup>45</sup> For a summary of the constitutional background, see Justice M Weinberg, 'The Current and Proposed Criminal Jurisdiction of the Federal Court' (Paper presented at the Federal Criminal Law Conference, Sydney, 5 September 2008).

<sup>46</sup> See Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 (Cth). This Bill has raised a host of legal and practical issues that are beyond the scope of this paper. They are canvassed in the submissions to and report by the Senate Standing Committee on Legal and Constitutional Affairs on the Bill: see [http://www.aph.gov.au/senate/committee/legcon\\_cte/criminal\\_jurisdiction/index.htm](http://www.aph.gov.au/senate/committee/legcon_cte/criminal_jurisdiction/index.htm), last viewed 29 May 2009.

<sup>47</sup> See Commonwealth Constitution, s 80.

Territory levels of government.<sup>48</sup> Conservative governments in Australia, however, have had a history of resisting tough penalties for anti-competitive conduct, particularly criminal penalties.<sup>49</sup> Criminal sanctions were removed by a conservative government from the 1965 statute, the forerunner to the current TP Act, which was based on an administrative rather than a judicial model of enforcement and relied on voluntary registration by businesses of restrictive agreements.<sup>50</sup> Criminal sanctions were reinstated by the Labor government for at least consumer protection offences in the TP Act in 1974,<sup>51</sup> although at the instigation of a conservative government the sentencing option of imprisonment was removed just three years later.<sup>52</sup> It was also a Labor government that oversaw the substantial increase in pecuniary (civil) penalties in 1993 for anti-competitive conduct, from AU\$250,000 to AU\$10 million for corporations and from AU\$50,000 to \$AU500,000 for individuals.<sup>53</sup> Thus it is unsurprising that, when the criminalizing legislation is passed in 2009, it will be on the watch of a Labor government.

While the idea was born in the term of a conservative government, it was both hatched and championed, not by the government, but by the ACCC.<sup>54</sup> That the then conservative government fell into line, albeit reluctantly, was in large part a function of the high profile and strong public support for the fiercely independent regulator under its then leader, the charismatic Professor Allan Fels.<sup>55</sup> The ACCC called for criminalization in a submission to a government-instigated review of Australia's competition legislation by an independent committee (Dawson Committee) in 2002.<sup>56</sup> In 2003 the then Treasurer accepted 'in principle', albeit guardedly, the recommendation of the Dawson

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<sup>48</sup> As evidenced most markedly by the agreement of the Council of Australian Governments to implement a National Competition Policy in 1995, thereby enabling the competition provisions of the TP Act to apply throughout Australia as a national Competition Code, as well as to subject all Commonwealth, State and Territory legislation to review for competition restrictions. A summary of the history and progress of the National Competition Policy will be available in Organization of Economic Co-operation and Development, *Competition Law and Policy in Australia*, Country Review (2009) (forthcoming).

<sup>49</sup> See C Beaton-Wells, 'The Politics of Cartel Criminalisation: A Pessimistic View from Australia' (2008) 3 *European Competition LRev* 185, 187-188.

<sup>50</sup> Trade Practices Act 1965 (Cth). The Act created a procedure for the examination by the Trade Practices Commission of questionable practices that could then be the subject of an order by the Trade Practices Tribunal declaring them illegal. Contravention of such an order would lead to prosecution for contempt of the Tribunal (rather than for the practice itself).

<sup>51</sup> See TP Act, Pt VC.

<sup>52</sup> See A Hopkins, *Crime, Law and Business: The Sociological Sources of Australian Monopoly Law* (Australian Institute of Criminology, 1978) 119-120.

<sup>53</sup> See TP Act, ss 76(1A)-(1B).

<sup>54</sup> See the discussion in C Beaton-Wells, 'Criminalising Cartels: Australia's Slow Conversion' (2008) 31 *World Competition: Law & Economics Rev* 205.

<sup>55</sup> See generally F Brechley, *Allan Fels: A Portrait of Power* (John Wiley & Sons Australia Ltd, 2003).

<sup>56</sup> Australian Competition and Consumer Commission, 'Submission to the Trade Practices Act Review Committee' (June 2002), at <http://tpareview.treasury.gov.au/submissions.asp>, last viewed 29 May 2009.

Committee<sup>57</sup> emphasizing the need for any new criminal penalty regime to apply broadly, not to impose ‘significant additional uncertainty and complexity for business’ and to ‘work well in the context of the Australian legal system’.<sup>58</sup> The process adopted subsequently to develop the legislative proposals was marked by secrecy, obfuscation and delay.<sup>59</sup>

A working party was appointed and reported to the government in 2004.<sup>60</sup> It did not call for submissions publicly and it is not known whether it undertook any consultation beyond the bodies represented upon it (those being the ACCC, DPP and the responsible government department, the Treasury). It did not release its report or its recommendations for public consideration and a subsequent request for access to its report under freedom of information legislation was refused.<sup>61</sup> Unlike the practice in respect of proposals for the reform of corporate and financial services regulation, there was no public discussion paper issued.<sup>62</sup> Nor was there a reference to the highly respected Australian Law Reform Commission (ALRC), notwithstanding the significance of cartel criminalization as a reform.<sup>63</sup>

The Treasurer sketched out the legislative proposals in a 13-page press release in 2005.<sup>64</sup> The release contained scant detail with respect to the elements of the proposed ‘cartel offence’. Significantly, however, it indicated that the offence would include an element of

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<sup>57</sup> Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) 161-162, at <http://www.tpareview.treasury.gov.au/content/report/downloads/PDF/Chpt10.pdf>, last viewed 29 May 2009.

<sup>58</sup> Treasurer, ‘Commonwealth Government Response to the Review of the Competition Provisions of the Trade Practices Act 1974’ (2003), at <http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=publications/TPAResponse.htm&min=phc>, last viewed 14 February 2008.

<sup>59</sup> Cf the process in Britain in relation to the creation of a cartel offence under the Enterprise Act 2002 (UK), s 188, as summarized in C Beaton-Wells, ‘The Politics of Cartel Criminalisation: A Pessimistic View from Australia’ (2008) 3 *European Competition LRev* 185, 191.

<sup>60</sup> Treasurer, ‘Working Party to Examine Criminal Sanctions for Cartel Behaviour’ (Press Release, 3 October 2003), at <http://www.treasurer.gov.au/tsr/content/pressreleases/2003/086.asp>, last viewed 29 May 2009.

<sup>61</sup> See *Fisse v Secretary, Department of the Treasury* (2008) 172 FCR 513. Further background and documents relevant to the freedom of information request are available at <http://www.brentfisse.com/news.html>.

<sup>62</sup> Cf the policy on best practice processes in regulation issued by the Australian Government’s Office of Best Practice Regulation at <http://www.obpr.gov.au/consultation.html>. In the context of corporate regulation specifically, see, eg Treasury, *Review of Sanctions in Corporate Law*, Discussion Paper, at <http://www.treasury.gov.au/contentitem.asp?Navid=037&ContentID=1182>, last viewed 29 May 2009.

<sup>63</sup> This body only recently examined and reported on the related subjects of federal civil and administrative penalties and sentencing of federal offenders and hence would have been well placed to examine the issues involved in cartel criminalisation: see Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002); Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006).

<sup>64</sup> Treasurer, ‘Criminal Penalties for Serious Cartel Behaviour’ (Press Release 2 February 2005), at [www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp](http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp), last viewed 29 May 2009.

dishonesty.<sup>65</sup> This particular aspect of the proposal signalled ambivalence on the part of the government as to the moral basis for criminalization and a concern about the challenges of communicating the criminality of cartel conduct to others.<sup>66</sup> Further indicia of political wavering were found in the proposed penalties for individual offenders – maximum five years’ imprisonment and/or a maximum fine of AU\$220,000 (less than half the maximum civil penalty) – and the questions left hanging as to whether the ACCC would have the necessary powers and resources to enforce the new criminal provisions.<sup>67</sup>

An exposure draft of the Bill was not released for comment. Treasury papers indicated that the Bill would be introduced into Parliament in the winter sittings of 2006.<sup>68</sup> It did not emerge and no explanation for the delay was offered.<sup>69</sup> In 2007 the Bill was listed again for parliamentary attention, this time within days of high profile ACCC enforcement activity and renewed calls by the regulator for criminal sanctions for cartel conduct.<sup>70</sup> However, a federal election intervened and the Bill lapsed.

Significantly, in the last days of a hard-fought election campaign, the ACCC scored a major victory with record-breaking penalties against a price fixing cartel in the cardboard packaging industry.<sup>71</sup> It took down Visy Ltd, one of Australia’s largest manufacturing companies, and with it, Australia’s fourth richest man, renowned philanthropist, political

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<sup>65</sup> The terms of the proposed offence were to ‘prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the contract, arrangement or understanding is made or given effect to with the intention of dishonestly obtaining a gain from the customers who fall victim to the cartel.’

<sup>66</sup> See the discussion of dishonesty as an indicium of moral wrongfulness in C Beaton-Wells, ‘Capturing the Criminality of Hard-Core Cartels: The Australian Proposal’ (2007) 31 Melbourne U LRev 675, 694-701.

<sup>67</sup> See the discussion in C Beaton-Wells, ‘The Politics of Cartel Criminalisation: A Pessimistic View from Australia’ (2008) 3 European Competition LRev 185, 193-194.

<sup>68</sup> See Australian Government, *Budget Paper No. 2 Part 2 – Expense Measures – Treasury* (2006), at <http://www.budget.gov.au/2006-07/bp2/html/index.htm>, last viewed 29 May 2009.

<sup>69</sup> However, it was evident that the government in effect was pipelining the various trade practices reform packages then under consideration, using the promised cartel crime bill as leverage in negotiation with parliamentarians who were standing in the way of its other reforms, relating primarily to merger review processes and predatory pricing provisions.

<sup>70</sup> In particular, around this time, publicity was given to significant penalties for price fixing in the air-conditioning industry, a global airline cargo cartel in which the national carrier Qantas has been implicated and the announcement of an ACCC investigation into price fixing in stevedoring operations on Australian wharves. See M Drummond, ‘\$9.2m punishment for air-con cartel’, *Australian Financial Review* (27 July 2007) 18; S Creedy, ‘Fines bolster class action against Qantas’ *The Australian* (6 August 2007); Australian Competition and Consumer Commission, ‘ACCC institutes legal proceedings against stevedores and senior executives for alleged collusion’ (Media release #233/07, 24 August 2007), at <http://www.accc.gov.au/content/index.phtml/itemID/796769/fromItemId/2332>, last viewed 29 May 2009.

<sup>71</sup> See *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd [No 3]* (2007) 244 ALR 673. A penalty of AU\$36,000,000 was imposed on the corporate respondents (the previous maximum having been AU\$15,000,000) and penalties of AU\$1,500,000 and AU\$500,000 on two individual respondents (the previous maximum having been AU\$200,000).

donor and Visy Chairman, Richard Pratt.<sup>72</sup> In the media frenzy that accompanied the announcement of the settlement and Pratt's public apology, the then Prime Minister John Howard praised the Visy Chairman for his contributions to Australian business and society and not coincidentally, it may seem, at the same time declined to re-commit the government to criminalization.<sup>73</sup>

The then Labor opposition seized the opportunity to voice its public support for criminalization, promising if elected to introduce criminal penalties in its first year in office.<sup>74</sup> Upon election, consistent with a general commitment to renewing competition policy in Australia, the Labor government appointed the country's first Minister for Competition Policy and Consumer Affairs – Christopher Bowen.<sup>75</sup> With the change from a conservative to a Labor government came a change in the approach taken to the development of the criminalizing legislation. While remaining inherently political and hence imperfect from the standpoint of principle or policy, there was a clear shift from an approach marked by ambivalence and prevarication to one marked by consultation and compromise.

Bowen is a youthful, ambitious and hard-working politician and, in keeping with his party's election promise, released an Exposure Draft Bill of the criminalizing legislation, together with a discussion paper and a draft of the ACCC/DPP MOU, in January 2008.<sup>76</sup> In particular, he sought submissions on the questions as to whether dishonesty should be an element of the new offence and whether the ACCC should have telecommunications interception powers.<sup>77</sup> The submissions on both questions were divided,<sup>78</sup> but also raised

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<sup>72</sup> Although, controversially, the ACCC did not seek a penalty personally against Pratt. For background and criticism of this particular aspect of the case, see C Beaton-Wells and N Brydges, 'The cardboard box cartel case: Was all the fuss warranted?' (2008) 36 Australian Business LRev 6, 16-19.

<sup>73</sup> See 'No plans to make price fixing criminal', AAP (9 October 2007); 'PM back-pedals on cartel penalties', Australian Financial Review (10 October 2007) 1. This led to a conflicting statement by the Treasurer: 'Cartel behaviour should be criminal', AAP (9 October 2007). However, further underlining the ambivalence of conservative politicians in relation to criminalization as well as the inevitable politicization of the issue, the former Treasurer (now in opposition) was recently reported as having urged the conservative party room not to support the CC & OM Bill (see 'Costello puts his oar in on cartels law', Australian Financial Review (18 March 2009) 9).

<sup>74</sup> C Bowen, 'Howard and Costello take conflicting positions on criminal penalties for cartel behaviour' (Press Release, 9 October 2007), at <http://www.alp.org.au/media/1007/msat090.php>, last viewed 29 May 2009.

<sup>75</sup> See <http://www.treasurer.gov.au/Main.aspx?PageID=089&min=ceb>. On 7 June 2009, following a Cabinet reshuffle, the portfolio was handed to the Minister for Small Business, Independent Contractors and the Service Economy, Craig Emerson, to combine with his other portfolios, as well as his responsibilities in assisting the Minister for Deregulation.

<sup>76</sup> See Treasury, 'Criminal penalties for serious cartel conduct: Draft Legislation' (11 January 2008), at <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1330>, last viewed 29 May 2009.

<sup>77</sup> See Treasury, 'Criminal penalties for serious cartel conduct: Discussion Paper' (11 January 2008), at [http://www.treasury.gov.au/documents/1330/PDF/Cartels\\_Bill\\_Discussion\\_paper.pdf](http://www.treasury.gov.au/documents/1330/PDF/Cartels_Bill_Discussion_paper.pdf), last viewed 29 May 2009.

a host of other complex legal and practical issues relevant to the design and enforcement of the proposed legislation.<sup>79</sup> So began a torturous and protracted process of consultation and revision, the results of which are yet to be finalized more than 18 months later.

In October 2008 Bowen released a second Exposure Draft Bill.<sup>80</sup> Dishonesty had been removed, it having been conceded that the dishonesty element would be problematic from an enforcement perspective.<sup>81</sup> The ACCC would have telecommunications interception powers, and in a further sign that the Labor government was seeking to remove any doubt about its criminalization credentials, the proposed maximum jail term had been lifted from five to 10 years. Australia was thus to stand shoulder-to-shoulder in this regard with the world's leading criminal cartel-buster, the United States.<sup>82</sup>

However, instead of the accolades that might have been expected for its consultative yet tough stance, Bowen found himself fending off criticisms on account of the fact that

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- <sup>78</sup> The submissions are available at <http://www.treasury.gov.au/contentitem.asp?ContentID=1350&NavID=037>. Division was particularly acute on whether the cartel offences should be distinguished from civil contraventions by an element of dishonesty. Even the Law Council of Australia found itself in the unusual position of being internally divided on the issue – the National Criminal Law Liaison Committee favoured the incorporation of a dishonesty element ([http://www.treasury.gov.au/documents/1350/PDF/LCA\\_criminal\\_law\\_combined.pdf](http://www.treasury.gov.au/documents/1350/PDF/LCA_criminal_law_combined.pdf)), while the Trade Practice Committee of the Business Law Section opposed it ([http://www.treasury.gov.au/documents/1350/PDF/LCA\\_Trade\\_Practices\\_Committee.pdf](http://www.treasury.gov.au/documents/1350/PDF/LCA_Trade_Practices_Committee.pdf).) For commentary on the division, see C Beaton-Wells, 'Cartel law could be dead letter', *Australian Financial Review* (11 March 2008) 71.
- <sup>79</sup> For a detailed critique of the issues, see C Beaton-Wells and B Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy' (2008) 36 *Australian Business LRev* 166.
- <sup>80</sup> See Treasury, 'Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008' (27 October 2008), at <http://www.treasury.gov.au/contentitem.asp?ContentID=1426&NavID=037>, last viewed 29 May 2009.
- <sup>81</sup> In the Bills Digest Entry for the CC&OM Bill, the explanation given for removing the dishonesty element was that it would require juries to make moral assessments which could result in inconsistent outcomes (see Paula Pyburne, 'Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008' (Bills Digest No 90, 2008-09, ISSN 1328-8091, 4 February 2009) 6-7, at <http://www.aph.gov.au/library/pubs/bd/2008-09/09bd090.pdf>, last viewed 29 May 2009). In the evidence of Treasury officials before the Senate Economics Committee, the explanation was that with the dishonesty element 'enforcement would effectively become impossible' (Transcript of evidence of Scott Rogers before Senate Economics Committee (16 Feb 2009) E6, at [http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/hearings/index.htm](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/hearings/index.htm), last viewed 29 May 2009). The Committee supported the decision to remove the dishonesty element: see Senate Standing Committee on Economics, *Report on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (2009), [4.7], at [http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/report/report.pdf](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/report/report.pdf), last viewed 29 May 2009). For a more thorough critique, see B Fisse, 'The Cartel Offence: Dishonesty?' (2007) 35 *Australian Business LRev* 235. There remain nevertheless vocal supporters: see A Gray, 'Criminal Sanctions for Cartel Behaviour' (2008) 8 *Queensland University of Technology Law and Justice Journal* 364; D Neal, 'Too many holes in bill to outlaw criminal cartels', *The Age* (1 May 2009).
- <sup>82</sup> As recorded in Commonwealth, *Parliamentary Debates*, House of Representatives (3 December 2008) 12310 (C Bowen, Minister for Competition Policy and Consumer Affairs, and Assistant Treasurer), at [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=1:query=Title%3Acartel%20Database%3AChamber%20Title%3A%22second%20reading%2%3F%20%20Context\\_Phrase%3AAbill%3F%20Speaker%3A%3F:querytype=:rec=12:resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=1:query=Title%3Acartel%20Database%3AChamber%20Title%3A%22second%20reading%2%3F%20%20Context_Phrase%3AAbill%3F%20Speaker%3A%3F:querytype=:rec=12:resCount=Default), last viewed 29 May 2009.

many of the issues highlighted in the first round of consultations had not been addressed. In particular, the much-criticized breadth of the proposed cartel offences and their mirror civil prohibitions was not off-set by important exceptions and defences that would insulate vertical conduct from per se liability under the cartel prohibitions, as well as protect legitimate and often pro-competitive joint venture activity.<sup>83</sup> Moreover, concerns remained as to how the involvement of the DPP would affect the operation of the ACCC Immunity Policy, another issue highlighted early in the year but on which there had been no further announcement.<sup>84</sup>

Yet more consultations were embarked upon.<sup>85</sup> Then, on 3 December 2008 – still within its first year of office – the government fulfilled its promise, introducing the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (CC&OM Bill) into Parliament.<sup>86</sup> The Bill reinstated the so-called ‘anti-overlap’ exemption for vertical conduct that had been missing from the Exposure Drafts. At the same time, a revised MOU between the ACCC and DPP was released and adjustments made to both the ACCC’s Immunity Policy and the DPP’s Prosecution Policy to address the immunity issue.<sup>87</sup> Even so, the critics would not be silenced.

<sup>83</sup> See, eg the comments of N Berkovic, ‘Practices bank on anti-cartel law bonanza’, *The Australian* (31 October 2008), at <http://www.theaustralian.news.com.au/business/story/0,28124,24578177-17044,00.html>, last viewed 29 May 2009.

<sup>84</sup> This was an issue highlighted in several of the submissions in response to the first Exposure Draft of the Bill released in January (the submissions are available at <http://www.treasury.gov.au/contentitem.asp?ContentID=1350&NavID=037>). See further the discussion in C Beaton-Wells and B Fisse, ‘Criminalising Serious Cartel Conduct: Issues of Law and Policy’ (2008) 36 *Australian Business LRev* 166, 218-224; C Beaton-Wells, ‘Forks in the Road: Challenges Facing the ACCC’s Immunity Policy for Cartel Conduct: Part 1’ (2008) 16 *Competition & Consumer LJ* 71, 75-91.

<sup>85</sup> As recorded in Commonwealth, *Parliamentary Debates*, House of Representatives (3 December 2008) 12310 (C Bowen, Minister for Competition Policy and Consumer Affairs, and Assistant Treasurer), at [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=1;query=Title%3Acartel%20Database%3Achamber%20Title%3A%22second%20reading%2%3F%20%20Context\\_Phrase%3Abill%3F%20Speaker%3A%3F:querytype=:rec=12:resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=1;query=Title%3Acartel%20Database%3Achamber%20Title%3A%22second%20reading%2%3F%20%20Context_Phrase%3Abill%3F%20Speaker%3A%3F:querytype=:rec=12:resCount=Default), last viewed 29 May 2009.

<sup>86</sup> Commonwealth, *Parliamentary Debates*, House of Representatives (3 December 2008) 12309 (C Bowen, Minister for Competition Policy and Consumer Affairs, and Assistant Treasurer), at [http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/2008-12-03/toc\\_pdf/6444-3.pdf;fileType=application%2Fpdf#search=%22Trade%20Practices%20Amendment%20\(Cartel%20Conduct%20and%20Other%20Measures\)%20Bill%202008%22](http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/2008-12-03/toc_pdf/6444-3.pdf;fileType=application%2Fpdf#search=%22Trade%20Practices%20Amendment%20(Cartel%20Conduct%20and%20Other%20Measures)%20Bill%202008%22), last viewed 29 May 2009.

<sup>87</sup> See the *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission*, at [http://www.accc.gov.au/content/item.phtml?itemId=706268&nodeId=353cdd807d07c920e807e65c172e1086&fn=ACCC\\_CDPP\\_MOU.pdf](http://www.accc.gov.au/content/item.phtml?itemId=706268&nodeId=353cdd807d07c920e807e65c172e1086&fn=ACCC_CDPP_MOU.pdf), last viewed 29 May 2009; Australian Competition and Consumer Commission, *Immunity Policy for Cartel Conduct* (revised, 26 August 2005), at [http://www.accc.gov.au/content/item.phtml?itemId=706268&nodeId=35422adbba2322f18c994c164eb5d180&fn=Revised\\_Immunity\\_Policy.pdf](http://www.accc.gov.au/content/item.phtml?itemId=706268&nodeId=35422adbba2322f18c994c164eb5d180&fn=Revised_Immunity_Policy.pdf), last viewed 29 May 2009; Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1992) [2.7]-[2.10], at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>, last viewed 29 May 2009..

The Bill was referred to a Senate Economics Committee that received submissions and held a public hearing. In this process two issues dominated.<sup>88</sup> The first was whether the proposed scheme differentiated adequately between conduct warranting criminal treatment and conduct to be treated as a civil contravention, and the related question as to whether so much faith should be placed in the ACCC and DPP to draw this distinction in the exercise of prosecutorial discretion.<sup>89</sup> The second was whether the proposed joint venture exception was too narrowly drawn – in particular, whether it should not be confined to contracts and whether it should not be limited to contracts for joint supply or production.<sup>90</sup>

The Committee was not persuaded that either of these issues necessitated amendments to the Bill and recommended that it be passed unamended.<sup>91</sup> However, it did recommend that the ACCC prepare guidelines to ameliorate uncertainty about the approach that will be taken to enforcement of the dual criminal/civil regime.<sup>92</sup> For many in government, given clear bipartisan support, this would have been sufficient to enable the legislative process to move ahead. However, Bowen's sensitivity to criticism, particularly from within the circles of Australia's legal elite, had become evident. Thus, in his final attempt to win over the critics in relation to the Bill, he commissioned the advice of senior counsel regarding the issues surrounding the joint venture exception.<sup>93</sup> In reliance on this advice, on 13 May 2009, the Minister announced amendments to the exception in the Bill,<sup>94</sup> only to find it reported in the next day's press that the amendments 'miss the

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<sup>88</sup> Senate Standing Committee on Economics, at [http://www.aph.gov.au/senate/Committee/economics\\_ctte/index.htm](http://www.aph.gov.au/senate/Committee/economics_ctte/index.htm), last viewed 29 May 2009.

<sup>89</sup> Senate Standing Committee on Economics, *Report on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (2009), [3.2]-[3.18], [3.48]-[3.50], [4.2]-[4.10], [4.17]-[4.18], at [http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/report/report.pdf](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/report/report.pdf), last viewed 29 May 2009.

<sup>90</sup> Senate Standing Committee on Economics, *Report on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (2009), [3.19]-[3.27], [4.12]-4.16], at [http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/report/report.pdf](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/report/report.pdf), last viewed 29 May 2009. The ACCC has indicated that it will publish these guidelines: S Court, 'Cartel behaviour should be criminal', AAP (9 October 2007).

<sup>91</sup> The Committee's report is vulnerable to criticism for its superficial treatment of the issues and weak conclusions: see J Clarke, 'Review misses bill's key point', Australian Financial Review (21 April 2009) 26.

<sup>92</sup> Senate Standing Committee on Economics, *Report on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (2009), [4.11] Recommendation 1, at [http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/report/report.pdf](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/report/report.pdf), last viewed 29 May 2009.

<sup>93</sup> As reported in 'Cartel law changes miss point', Australian Financial Review (14 May 2009) 4.

<sup>94</sup> For an explanation of the amendments moved by the Government, see Supplementary Explanatory Memorandum and Correction to the Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, at [http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4027\\_ems\\_4f2df285-4d72-4687-8e42-ec44d721a02c/upload\\_pdf/329294sem.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4027_ems_4f2df285-4d72-4687-8e42-ec44d721a02c/upload_pdf/329294sem.pdf;fileType=application%2Fpdf), last viewed 29 May 2009.

point'.<sup>95</sup> The advice was not made publicly available, and this lack of transparency was also criticized.

The CC & OM Bill was listed for the sittings of the Senate on 14 May 2009, but was pushed off the agenda by budget-related matters. It will next be before the Senate in sittings commencing 15 June 2009 but again may be deferred by consideration of emissions trading legislation (arguably a more pressing national and international priority than cartel regulation). When the Bill eventually passes into law, it will do so without the unqualified support of important stakeholders. Despite more than a year of consultation, compromise and consequential amendment, the government remains on the receiving end of at times scathing criticism by commentators. Much of the criticism is directed at the so-called issue of 'overreach' and the perceived failure of the policy-makers and the legislative drafters to define sufficiently narrowly and clearly the conduct to be criminalized. Dishearteningly no doubt for the government, this failing has prompted calls to 'return to the drawing board' and to delay the process further in the interests of 'getting it right'.<sup>96</sup> The consequence of resisting such calls, it has been predicted, will be that the new criminal regime 'fails to achieve the "big bang" sought after by its most ardent supporters'.<sup>97</sup>

#### 4. Legislative overreach and complexity

The new regime of cartel prohibitions to be introduced in Australia in 2009 has been criticized heavily for unjustifiable breadth in terms of the conduct caught by the prohibitions,<sup>98</sup> as well as for undue complexity in terms of their manner of expression.<sup>99</sup>

<sup>95</sup> 'Cartel law changes miss point', Australian Financial Review (14 May 2009) 4.

<sup>96</sup> See, eg 'Legal experts urge delay on ACCC cartel Power boost', Business Spectator (17 February 2009); 'Council attacks cartel proposal', The Australian (15 May 2009) 29; 'Cartel bill risks tying up the courts' The Australian (8 May 2009), at <http://www.theaustralian.news.com.au/business/story/0,,25445016-17044,00.html>, last viewed 21 May 2009.

<sup>97</sup> B Fisse, 'Crude cartel line easily breached', Australian Financial Review (19 May 2009) 63. See further B Fisse, 'Avoidance and Denial of Liability for the Cartel Offences: Proactive Lawful Escape Routes Left Open by the Cartel Legislation', Paper given at Competition Law Conference, Sydney, May 2009, at <http://www.brentfisse.com/publications.html>.

<sup>98</sup> See, eg Law Council of Australia, 'Submission to Treasury on the Criminal Penalties for Serious Cartel Conduct – Draft Legislation' (5 March 2008) 13-24 [23]-[73], at [http://www.treasury.gov.au/documents/1350/PDF/LCA\\_Trade\\_Practices\\_Committee.pdf](http://www.treasury.gov.au/documents/1350/PDF/LCA_Trade_Practices_Committee.pdf), last viewed 29 May 2009; C Beaton-Wells and B Fisse, 'Submission to Treasury on the Criminal Penalties for Serious Cartel Conduct – Draft Legislation' (7 March 2008) 5-11, at [http://www.treasury.gov.au/documents/1350/PDF/Dr\\_Caron\\_Beaton-Wells\\_and\\_Mr\\_Brent\\_Fisse.pdf](http://www.treasury.gov.au/documents/1350/PDF/Dr_Caron_Beaton-Wells_and_Mr_Brent_Fisse.pdf), last viewed 29 May 2009; Speed and Stracey, 'Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008' (20 January 2009) 1-3, at [http://www.aph.gov.au/senate/committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub06.pdf](http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub06.pdf), last viewed 29 May 2009; Law Council of Australia, 'Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008' (30 January 2009) 2-3 [3.1(a)], at

The result is that business activity that is either benign or indeed may even be pro-competitive or otherwise welfare-enhancing may be ‘chilled’ by the very law that is intended to promote competition in the Australian economy.<sup>100</sup>

However, it is important to appreciate that these complaints are not novel in the context of Australian competition law, even if they are heightened in the context of the introduction of a criminal regime. In fact, the criticisms are best understood as criticisms that may be made more generally of two entrenched and distinctive features of the approach taken to competition legislation in this country. The first feature relates to the substance of the law and the second to the style of its drafting.

#### 4.1 Legislative substance

In terms of the substance of the law, there is a history of formulating prohibitions for the TP Act that are over-inclusive in their terms and/or attach per se liability in circumstances in which it is arguably not warranted. In the cartel context, this is no more true than of the per se prohibition on exclusionary provisions in s 45, referred to above.<sup>101</sup> Paraphrasing, an exclusionary provision is defined as a provision that has the purpose of preventing or limiting dealings with third parties.<sup>102</sup> The essential flaw in this formulation is that it imposes a per se ban on conduct that is not necessarily anti-competitive or without any redeeming economic or social virtue in the sense generally assumed to attract strict liability in antitrust law.<sup>103</sup> Not surprisingly, the application of the prohibition has generated some strange results, most notably in the context of assessing whether it should

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[http://www.aph.gov.au/senate/committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub10.pdf](http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub10.pdf), last viewed 29 May 2009.

<sup>99</sup> See, eg Frank Zumbo, ‘Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008’ (30 January 2009) 5-7, at [http://www.aph.gov.au/senate/committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub11.pdf](http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub11.pdf), last viewed 29 May 2009; Law Council of Australia, ‘Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008’ (30 January 2009) 6 [(e)], 7 [(g)], at [http://www.aph.gov.au/senate/committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub10.pdf](http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub10.pdf), last viewed 13 March 2009.

<sup>100</sup> See the statement of statutory objective in TP Act, s 2.

<sup>101</sup> Another example is the per se prohibition on third line forcing in TP Act, s 47.

<sup>102</sup> See the full definition in TP Act, s 4D.

<sup>103</sup> The classic statement on the rationale for per se illegality is found in *Northern Pacific Railway v US* 356 US 1 (1958) 5. See generally F Easterbrook, ‘The Limits of Antitrust’ (1984) 63 Texas LRev 1; J Baker, ‘Per se rules in the antitrust analysis of horizontal restraints’ (1991) 36 Antitrust Bulletin 641; Krattenmaker, ‘Per se violations in antitrust law: Confusing offences with defenses’ (1988) 77 Georgetown Law Journal 165; O Black, ‘Per se rules and rules of reason: What are they?’ (1997) 3 ECLR 145.

prohibit sporting authorities from deciding which players and how many teams to have in their competitions.<sup>104</sup>

The scope of the prohibition has been criticized.<sup>105</sup> Recommendations that it be narrowed substantially have been made but ignored.<sup>106</sup> The problem has been aggravated by the absence of sufficient exemptions or exceptions to the prohibition to recognize and balance competing policy interests. The anti-overlap exemptions referred to above have their limitations (for example, they do not save supply agreements between competitors from the per se reach of s 45),<sup>107</sup> and a joint venture exception involving a competition test was introduced only in 2007.<sup>108</sup> Moreover, a broader doctrine or defense of ancillary restraints, excluding from per se liability anti-competitive conduct that is ancillary to co-operative efficiency-enhancing activity, is foreign to Australian competition law.<sup>109</sup>

The reason for this in large part is because competition and economic efficiency are treated as two separate concepts under the TP Act. Competition assessments are the

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<sup>104</sup> See *Hughes v Western Australian Cricket Association* (1986) 19 FCR 10; *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563. See generally I Wylie, 'What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond' (2007) 35 Australian Business LRev 33.

<sup>105</sup> See, eg C Oddie and L McKeown, 'Joint Ventures and exclusionary provisions: Anticompetitive purpose or unintended effects?' (2002) 10 Competition & Consumer LJ 192; W Pengilley, *Price Fixing and Exclusionary Provisions* (Prospect, 2001) Pt 10; W Reid, 'Exclusionary Provisions – Dead, Alive or Living in Mexico?' (Paper presented at the Law Council of Australia, Trade Practices Committee Workshop, 2003) (copy on file with author).

<sup>106</sup> The Dawson Report accepted the criticisms, recommending that there be a defense 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 (see Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) 127-128 Recommendations 8.1-8.2, at <http://www.tpareview.treasury.gov.au/content/report/downloads/PDF/Chpt8.pdf>, last viewed 29 May 2009. Despite accepting these recommendations initially, the government subsequently simply decided to provide a new joint venture defense, taking the view that any other concerns had been ameliorated by the High Court's interpretation of s 4D in decisions handed down after the Dawson Report (see Treasurer, 'Commonwealth Government Response to the Review of the Competition Provisions of the Trade Practices Act 1974' (2003), at <http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=publications/TPAResponse.htm&min=phc>, last viewed 14 February 2008). However, the difficulties identified in the Dawson Report with respect to s 4D have not been resolved. If anything the operation of the prohibition of exclusionary provision is even more uncertain.

<sup>107</sup> See the discussion in B Fisse, 'Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008' (20 January 2009) s 4, at [http://www.apf.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub05.pdf](http://www.apf.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf), last viewed 29 May 2009.

<sup>108</sup> See TP Act, s 76C.

<sup>109</sup> See generally PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2<sup>nd</sup> edn, Aspen Law & Business, 2005) vol XI, 19B, 61 et seq, ¶1904 et seq; J Faull and A Nikpay, *The EC law of competition* (Oxford University Press, 2007) [3.181]-[3.214]. See also the comparative analysis in J Bos, 'Antitrust Treatment of Cartels: A Comparative Survey of Competition Law Exemptions in The United States, The European Union, Australia and Japan' (2002) 1 Washington University Global Studies LRev 415; L Vary, 'Price Fixing: Flawed Past, Uncertain Future' (1995) TPLJ 126.

province of the statutory prohibitions enforced by the courts, whereas more general efficiency assessments are the domain of the administrative agencies empowered to exempt conduct from the prohibitions under a procedure of authorization.<sup>110</sup> This is not to say that the courts have not sought to introduce efficiency analysis into the interpretation of the prohibitions, albeit with results that have generated more uncertainty than clarity.<sup>111</sup> Moreover, the availability of authorization has not been seen as a satisfactory response to the overreach of the per se prohibition on exclusionary provisions.<sup>112</sup> As a matter of principle, it has been argued, legitimate business conduct should not be subject to a procedure that requires parties to demonstrate public benefits when the conduct may not be even anti-competitive and that imposes conditions and time limitations on the protection that is granted. Authorization is also impractical, imposing costs, delays, publicity and uncertainty in circumstances in which such imposts are evidently unwarranted. More generally, it reduces self-reliance and independent decision-making.<sup>113</sup>

The approach that has been taken in formulating the new cartel offences and civil per se prohibitions not only perpetuates the problems with the per se prohibition on exclusionary provisions but aggravates it given the imposition of criminal liability. The difficulties are compounded by the overlap between this prohibition and the new prohibitions addressed to output restriction and market allocation in particular.<sup>114</sup> The new prohibitions, criminal and civil, attach to provisions that have the purpose of directly or indirectly:

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<sup>110</sup> While there have been some commentators who have argued against retention of this separation and for explicit incorporation of efficiencies into judicial analysis (see, eg P Williams and G Woodbridge, 'The Relation of Efficiencies to the Substantial Lessening of Competition Test for Mergers: Substitutes or Complements?' (2002) 30 Australian Business LRev 435), the argument appears to have little traction in wider circles.

<sup>111</sup> See, eg, the interpretation of exclusionary purpose in *See News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563. The attempt to introduce a back door 'efficiency' defence has also been seen in the context of interpretation of Australia's abuse of dominance prohibition, s 46: see *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 178 ALR 253.

<sup>112</sup> Nor has the similar notification procedure for third line forcing. The ACCC receives hundreds of these notifications each year and opposes only a handful of them.

<sup>113</sup> See the criticisms in W Pengilly, 'Collective boycotts under the Australian Trade Practices Act: What our policy-makers have failed to understand and what the Dawson Committee should do about it' (2002) 10 Competition & Consumer LJ 144, 184.

<sup>114</sup> Apparently s 4D is being retained 'as a backstop for the new cartel provisions' given that it is wider in scope: see M Bezzi, 'The conduct of cartel litigation: The ACCC enforcement perspective on serious cartels – some key issues and practical considerations' (Paper presented at the Competition Law Conference, Sydney, 23 May 2009) 4. The other prohibitions on price fixing and bid rigging are also beset by overreach and uncertainty: see the discussion in C Beaton-Wells and B Fisse, 'The Cartel Offences: An Elemental Pathology' (Paper presented at the Federal Court of Australia – Law Council of Australia Workshop, Adelaide, 3-4 April 2009) s 2.3; B Fisse, 'Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008' (20 January 2009) s 3.3, at

- preventing, restricting or limiting production, capacity or supply by all or any of the parties to the contract, arrangement or understanding;<sup>115</sup> or
- allocating customers, suppliers or geographical areas between any of all of the parties to the contract, arrangement or understanding.<sup>116</sup>

Illustrations of conduct inappropriately caught by these overreaching prohibitions proliferate. Some of the examples provided in the commentary on the CC&OM Bill over the last year have related to rostering schemes, tolling arrangements, public safety/emergency response measures, and supply agreements between competitors.<sup>117</sup> The overreach is not cured by the anti-overlap exemptions and nor, for the reasons cited earlier, is it compensated for by the availability of the authorization procedure. This is even more so in the context of the cartel offences given the importance of confining indictable offences to unambiguously serious conduct.<sup>118</sup> Further, there is no apparent prospect of the prohibitions being judicially ‘read down’. The Australian High Court has ruled that where the same statutory language is used for both criminal and civil prohibitions, the same interpretation must be adopted in both contexts.<sup>119</sup>

The disquiet caused by the scope of the new prohibitions has been heightened by the approach taken to formulation of the new joint venture exception. As mentioned above, the exception will not involve a competition test.<sup>120</sup> While this may be explicable in relation to the cartel offences, it does not explain why the test has been removed in relation to the new civil per se prohibitions (while it remains in relation to the joint venture exception for exclusionary provisions).<sup>121</sup> The exception is also confined to joint ventures formalized in contracts (or arrangements or understandings intended to have contractual effect) – a further point of difference from the existing exception which extends to arrangements and understandings without qualification. The ACCC argued that

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[http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub05.pdf](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf), last viewed 23 March 2009..

<sup>115</sup> See proposed TP Act, s 44ZZRD(3)(a).

<sup>116</sup> See proposed TP Act, s 44ZZRD(3)(b).

<sup>117</sup> See Law Council of Australia, ‘Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008’ (30 January 2009) 10 [20], at [http://www.aph.gov.au/senate/committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub10.pdf](http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub10.pdf), last viewed 13 March 2009.; C Beaton-Wells and B Fisse, ‘The Cartel Offences: An Elemental Pathology’ (Paper presented at the Federal Court of Australia – Law Council of Australia Workshop, Adelaide, 3-4 April 2009) Attachment 1.

<sup>118</sup> A Ashworth, *Principles of Criminal Law* (5<sup>th</sup> edn, Oxford University Press, 2006) 40-44.

<sup>119</sup> *Waugh v Kippen* (1986) 160 CLR 156, 165, where the High Court held that 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’).

<sup>120</sup> See proposed TP Act, ss 44ZZRO, 44ZRP.

<sup>121</sup> See TP Act, s 76C.

this confinement was necessary to prevent firms from escaping liability through the construction of sham joint ventures.<sup>122</sup> However, of equal concern is that it exposes to liability (criminal and civil) firms that make an arrangement or arrive at an understanding that contains a cartel provision or give effect to a cartel provision in the negotiation or implementation of a legitimate joint venture.<sup>123</sup> Limited also to joint venture activity involving production or supply, the exception excludes joint ventures that exclusively involve acquisition, marketing or research and development activity.<sup>124</sup>

The limitations on the joint venture exception have few, if any, justifications on policy or practical grounds. But they are consistent with a tradition of overreach in the Australian formulation of cartel prohibitions. They are also consistent with a prescriptive black-letter law style of statutory drafting that reflects a rule-based rather than a principle-based approach to regulation.<sup>125</sup> This approach in turn reflects shallow faith in the judiciary's capacity to distinguish between conduct that the legislature intended to be banned from conduct that is 'innocent' from a competition perspective.<sup>126</sup>

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<sup>122</sup> Australian Competition and Consumer Commission, 'Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008' (12 February 2009) 5, at [http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub12.pdf](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub12.pdf), last viewed 29 May 2009. The ACCC relied on the experience in Canada as justification for this concern. Cf the analysis in C Beaton-Wells and B Fisse, 'The Cartel Offences: An Elemental Pathology' (Paper presented at the Federal Court of Australia – Law Council of Australia Workshop, Adelaide, 3-4 April 2009) Addendum.

<sup>123</sup> See Law Council of Australia, 'Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008' (30 January 2009) 7-9, at [http://www.aph.gov.au/senate/committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub10.pdf](http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub10.pdf), last viewed 13 March 2009; B Fisse, 'Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008' (20 January 2009) s 5.3.2, at [http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub05.pdf](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf), last viewed 29 May 2009; B Fisse, 'The Contract Requirement for the Joint Venture Exceptions under Sections 44ZZRO and 44ZZRP of the Cartel Bill', 9 June 2009, at [http://www.brentfisse.com/images/Fisse\\_The\\_Contract\\_Requirement\\_for\\_the\\_Joint\\_Venture\\_Exceptions\\_under\\_ss%2044ZZRO\\_and\\_44ZZRP.pdf](http://www.brentfisse.com/images/Fisse_The_Contract_Requirement_for_the_Joint_Venture_Exceptions_under_ss%2044ZZRO_and_44ZZRP.pdf).

<sup>124</sup> See Law Council of Australia, 'Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008' (30 January 2009) 7-9, at [http://www.aph.gov.au/senate/committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub10.pdf](http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub10.pdf), last viewed 13 March 2009; B Fisse, 'Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008' (20 January 2009) s 5.3.3, at [http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub05.pdf](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf), last viewed 29 May 2009. This limitation is ameliorated to some extent by the effect of other exceptions or exemptions: see the examples given in Parliament of Australia, Senate, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Supplementary Explanatory Memorandum, [1.9]-[1.11].

<sup>125</sup> K McMahon, 'Competition Law, Adjudication and the High Court' MULR Vol. 30, 2006, p.782; J Black, 'Forms and Paradoxes of Principles-Based Regulation' LSW Law, Society and Economics Working Paper 13/2008 at <http://www.ssrn.com/abstract.1267722>.

<sup>126</sup> The misguidedness of such an approach in respect of joint ventures particularly is highlighted by the observations of Robert Pitofsky regarding the 'sheer number of different types of joint ventures which may occur and the proliferation and complexity of relevant factors necessary to describe their competitive impact': see R Pitofsky, 'Joint Ventures under Antitrust Laws: Some reflections on the significance of Penn-Olin' (1969) 82 Harvard LRev1007. For an analysis demonstrating the difficulties

## 4.2 Legislative style

The second feature of Australian competition law that is relevant in understanding the debate over the CC & OM Bill relates to the style of statutory drafting. Consistent with many other Australian statutes, the TP Act employs a complex, prescriptive, prolix style of drafting.<sup>127</sup> As a result of attempting to define minutely all possibilities and close off any escape routes, most of the provisions are replete with double negatives, proliferating alternatives, multiple cross-references, extensive qualifications and complex statutory interrelationships. The drafting has been criticized by both commentators and judges,<sup>128</sup> and provokes comparisons with the brevity that is a hallmark of the prohibitions under the United States Sherman Act, the European Treaty of Rome and perhaps even more relevantly, the recently amended per se prohibitions on cartel conduct under the Canadian Competition Act.<sup>129</sup>

The effect of this drafting style is that parties and judges often focus more on logic-chopping interpretive parsing and analysis of the words of the statute than on the fundamental purposes and concepts underlying the legislation.<sup>130</sup> The result is a word-based rather than a transaction- or outcome-based approach to application of the

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that arise as a result of the drafting of the existing joint venture defences in the TP Act, see B Fisse, 'The Joint Venture Defences under Sections 76C and 76D of the Trade Practices Act' in M Chetwin and PA Joseph, *Joint Venture Law* (Centre for Commercial and Corporate Law, University of Canterbury, 2008).

<sup>127</sup> For example, Australian taxation legislation suffers from the same syndrome. See, eg Jim Corkery and Duncan Bentley, 'Too Many Words' (2001) 11 Revenue LJ 1; Duncan Bentley, (2004) 14 Revenue LJ 1.

<sup>128</sup> See, eg, the comments in *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 197, 409 (Stephen J); *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1; M Brunt, 'Preface' in R Steinwall (ed), *25 Years of Australian Competition Law* (Butterworths 2000) xiii; W Pengilly, 'Thirty Years of the Trade Practices Act: Some Thematic Conclusions' (2004) 12 Competition & Consumer LJ 1, 20-21.

<sup>129</sup> This contrast is seen as particularly instructive given that, like the Australian prohibitions, the Canadian prohibitions are also reflective broadly of the categories of 'hard core' conduct singled out by the OECD for toughest sanctions (see Organization for Economic Co-operation and Development, *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, C(98)35/FINAL (14 May 1998) 3, at <http://www.oecd.org/dataoecd/39/4/2350130.pdf>, last viewed 29 May 2009). Section 45 of the *Competition Act* 1985 was amended in 2009 (with effect from March 2010) to provide as follows:

- 45(1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
- (a) to fix, maintain, increase or control the price for the supply of the product;
  - (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
  - (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

The offence is subject to a defense of ancillary restraint under s 45(4).

<sup>130</sup> Organization of Economic Co-operation and Development, *Competition Law and Policy in Australia*, Country Review (2009) (forthcoming); W Pengilly, 'Thirty Years of the Trade Practices Act: Some Thematic Conclusions' (2004) 12 Competition & Consumer LJ 1, 9.

prohibitions.<sup>131</sup> The existing prohibitions on price fixing and exclusionary provisions, referred to above, are a good example of this syndrome. While these prohibitions are in s 45, the definitions of the relevant provisions are found in separate lengthy and convoluted sections.<sup>132</sup> Much of the case law on agreements between competitors potentially falling within the broad terms of these sections has been pre-occupied with semantic arguments over the meaning of words or phrases in the definitions – for example, ‘provision has the purpose’;<sup>133</sup> ‘fixing, controlling or maintaining or providing for the fixing, controlling or maintaining’;<sup>134</sup> ‘purpose of preventing, restricting or limiting’;<sup>135</sup> and ‘particular persons or classes of persons.’<sup>136</sup>

The reasons for this style of drafting in Australian statutes generally are beyond the scope of this paper. In the competition law context they include the original concern in drafting that judges, unfamiliar with this field of law, would struggle with the economic concepts and theories of antitrust.<sup>137</sup> That fear was borne out in the early years with judges

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<sup>131</sup> W Pengilly, ‘Thirty Years of the Trade Practices Act: Some Thematic Conclusions’ (2004) 12 *Competition & Consumer LJ* 1, 13, 23.

<sup>132</sup> TP Act, ss 45A and 4D.

<sup>133</sup> This phrase has given rise to questions as to whose ‘purpose’ is relevant to establish breach of the prohibition – whether it is the purpose of all of the parties to a contract, arrangement or understanding or merely the purpose of some parties, such as the party or parties responsible for including the provision in the contract, arrangement or understanding, as well as whether the purpose is subjectively or objectively ascertainable. See, eg, *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (1990) 27 FCR 460, 476; *Australian Competition and Consumer Commission v Pauls Ltd* (2002) ATPR ¶41-911; *Seven Network Limited v News Limited* [2007] FCA 1062, [2402] ff. See also the commentary in D Robertson, ‘The primacy of “purpose” in competition law - Part 1’ (2001) 9 *Competition & Consumer LJ* 101; D Robertson, ‘The primacy of “purpose” in competition law - Part 2’ (2002) 10 *Competition & Consumer LJ* 42.

<sup>134</sup> This phrase has given rise to questions such as whether there has to be some impact on price competition, as opposed to merely an effect on price and if the latter what kind or degree of effect is necessary in order for the prohibition to be breached. There have also been questions as to the extent of ‘control’ required in order for a provision to have a purpose or effect of ‘controlling’ a price and as to the meaning of ‘maintaining’ and ‘providing for’. See, eg *Radio 2 UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62 FLR 437; (1983) 68 FLR 348; *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd [No 8]* (1999) 92 FCR 375; *Apco Service Stations v Australian Competition and Consumer Commission* (2005) 159 FCR 452. See also the commentary in A Nicotra and J O’Regan, ‘Dare To Deem - Does Section 45A Trade Practices Act Prohibit “Pro-Competitive” Price Fixing?’ (2001) (unpublished); I Tonking, ‘Competition at Risk? New Forms of Business Cooperation’ (2002) 10 *Competition & Consumer LJ* 169, Pts 10-11.

<sup>135</sup> This phrase has given rise to questions such as whether the relevant exclusionary purpose has to be the immediate purpose of the parties or their ultimate purpose and how that purpose is to be ascertained (ie whether it may or should be derived from focussing on the provision in question or whether the wider context or circumstances of the overall transaction should be taken into account). See *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563.

<sup>136</sup> This phrase has given rise to questions such as how ‘particular’ persons or classes of persons are identified or defined and whether there needs to have been some form of ‘targetting’ of those persons or classes by the parties to the impugned contract, arrangement or understanding. See *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd [No 1]* (1990) 27 FCR 460; *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53.

<sup>137</sup> See, eg M Brunt, ‘Lawyers and Competition Policy’ in D Hambly and J Goldring (eds), *Australian Lawyers and Social Change* (Law Book Co, 1976) 266.

resorting to the dictionary in an attempt to understand what might have been intended in the use of terms such as ‘market’,<sup>138</sup> and displaying hostility to the reception of expert evidence from economists on such matters.<sup>139</sup> However, that time has passed. There is now a substantial body of jurisprudence in which the fundamental concepts and purposes of the TP Act have been extrapolated in accordance with mainstream economic theory. There is also now a well-established pool of judges with experience in hearing TP Act cases. To assist, there has been a concerted and sustained effort on the part of the judiciary, together with practitioners and economists, to develop constructive approaches to the reception and use of expert evidence in such cases.<sup>140</sup> In light of this, there is a good case for the view that ‘a statute written for interpretation by the judiciary some 30 or 40 years ago might well be quite inappropriate for a statute to be interpreted by our present judiciary’.<sup>141</sup>

That view is not reflected, however, in the provisions of the CC & OM Bill. These provisions perpetuate the highly prescriptive and complex drafting style of the existing provisions – the definition of ‘cartel provision’ runs for six pages of dense statutory text including 11 subsections, 36 paragraphs, and 1908 words, suggesting that the legislative drafters are impervious to the criticisms that have been made to date.<sup>142</sup> In the debate over the CC & OM Bill, commentators have been critical of the drafting, pointing to the unacceptable level of uncertainty caused for the business people subject to it.<sup>143</sup> The

<sup>138</sup> See, eg *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 24 FLR 286, 289.

<sup>139</sup> See, eg *Hecar Investments No 6 Pty Ltd v Outboard Marine Australia Pty Ltd* (1982) ATPR ¶¶40-298, 43,704; *Trade Practices Commission v Australia Meat Holdings Pty Ltd* (1988) ATPR ¶¶40-876, 49,479.

<sup>140</sup> For a summary of the development in the approach taken to expert evidence in trade practices cases, see C Beaton-Wells, *Proof of Antitrust Markets* (Federation Press, 2003) ch 7. For further discussion, see M Brunt, ‘The Use of Economic Evidence in Antitrust Litigation: Australia’ (1986) 14 Australian Business LRev 261; G Blunt et al, ‘From Arnotts to QIW – A Study of Expert Evidence in Trade Practices Cases’ (1994) 1 Competition & Consumer LJ 181; N Norman, ‘Economic Analysis and Evidence in the Australian Trade Practices Act’ (1994) 27 The Australian Economic Rev 87; D Robertson, ‘Expert economic evidence: Challenging the paradigm’ (2003) 11 Trade Practices LJ 70; C Hodgekiss SC, ‘Expert evidence in competition litigation’ (2006) 14 Trade Practices LJ 6.

<sup>141</sup> W Pengilly, ‘Thirty Years of the Trade Practices Act: Some Thematic Conclusions’ (2004) 12 Competition & Consumer L J 1, 9.

<sup>142</sup> Cf the provisions of the new per se cartel offences in the Canadian Competition Act 1985, s 45, as amended in 2009, to take effect in 2010.

<sup>143</sup> See, eg Frank Zumbo, ‘Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008’ (30 January 2009) 5-7, at [http://www.aph.gov.au/senate/committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub11.pdf](http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub11.pdf), last viewed 29 May 2009; Law Council of Australia, ‘Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008’ (30 January 2009) 6 [(e)],7 [(g)], at [http://www.aph.gov.au/senate/committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub10.pdf](http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/submissions/sub10.pdf), last viewed 13 March 2009; Additional comments of Senator Xenophon in Senate Standing Committee on Economics, *Report on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (2009), 36, at [http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/report/report.pdf](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/report/report.pdf), last viewed 29 May 2009).

uncertainty will extend also to those charged with applying the law – judges and, in the context of the cartel offences, juries. Evidently, little thought was given by the drafters to the formidable challenge that will arise in preparing comprehensible jury directions.<sup>144</sup> Even if that challenge is met, as one commentator has foreshadowed (tongue in cheek), there is ‘a high possibility that ... the foreman of a jury in a cartel-related criminal trial may well declare a not-guilty verdict with the additional comment to the court that the jury so found because it could not understand the law under which the accused was tried’.<sup>145</sup>

Two further consequences flow from the approach taken to the drafting of these provisions. The first, discussed in section 4.1 above, is that overreach is inevitable. By attempting to capture descriptively all of the possible ways in which competitors might engage in a general category of conduct, it is not hard to lose sight of the essence of the conduct motivating prohibition in the first instance.<sup>146</sup> If one sets out to describe all of the various ways in which competitors may agree to limit dealings with other market actors or reduce output, for example, invariably the description will cover situations which do not involve an agreement between competitors with the sole or dominant purpose of lessening competition between each other, notwithstanding that that is the essential concern with such transactions, at least from an economic point of view.<sup>147</sup>

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<sup>144</sup> See the comments in C Beaton-Wells and B Fisse, ‘Cartel Offences: Elemental Pathology’ (Paper presented at the Federal Court of Australia – Law Council of Australia Workshop, Adelaide, 3-4 April 2009) s 5.4.

<sup>145</sup> W Pengilly, ‘Imperfect Competition’, *Australian Financial Review* (20 June 2008) 9. The underlying point being that unless the elements required for liability can be conveyed to juries in a comprehensible way, they are likely to deliver verdicts based on non-legal conceptions: see R Charrow and V Charrow, ‘Making legal language understandable: a psycholinguistic study of jury instructions’ *Columbia Law Review* Vol. 79, 1979, p3106.

<sup>146</sup> Cf the suggestion that draftpersons adopt the ‘hippopotamus theory’. The best that can be done to describe a ‘hippopotamus’ is ‘a large herbivorous mammal having a thick hairless body, short legs and a large head and muzzle found in and near the rivers and lakes of Africa and able to remain under water for a considerable time (Macquarie Dictionary). As the author of the theory points out, ‘this does not conjure up any picture of what a hippopotamus really looks like. But we all know a hippopotamus when we see one! ... [O]bject-based, rather than black letter law based drafting is much the same. The picture may not be very precisely conveyed in the definition of [say] a joint venture but you certainly know one when you see one. With minute black letter law drafting, the perilous journey amongst the thicket of commas, subjunctive clauses, double negative and provisos may well mean that no picture ever gets presented – only the linguistic thicket.’ See W Pengilly, ‘Thirty Years of the Trade Practices Act: Some Thematic Conclusions’ (2004) 12 *Competition & Consumer LJ* 1, fn 37.

<sup>147</sup> Contrast *US v Addyston Pipe & Steel Co*, 85 Fed 271, 282-283 (1898); *US v Socony-Vacuum Oil Co*, 310 US 150 (1940). See further RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1978) 26-30, 135-136, ch 13; B Fisse, ‘Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008’ (20 January 2009) 12-17, 39, at [http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub05.pdf](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf), last viewed 29 May 2009.

The second consequence of excessively prescriptive drafting is that unexpected errors are made and arbitrary loopholes created. For example, the definition of an output restricting cartel provision under the CC&OM Bill covers restrictions in supply, production and capacity, but not in acquisition.<sup>148</sup> The drafting of the exception for joint ventures under the Bill requires that the cartel provision be ‘for the purposes of a joint venture’. However, as Fisse has pointed out, ‘there is no explicit requirement that the provision be for the “sole or dominant purposes” of a joint venture. This laxity opens the way for competitors to create “Mickey Mouse” joint venture arrangements in order to avoid the per se prohibitions against cartel conduct.’<sup>149</sup>

## **5. Enforcement bifurcation and excessive discretion**

The Australian debate over criminalization has been as much concerned with how the new law will be enforced as it has with its scope and drafting. Indeed, the two concerns are inextricably linked. The breadth of the proposed prohibitions as drafted brings to the fore questions about which agencies will decide to prosecute conduct as offences rather than civil contraventions and on what criteria such decisions will be based in practice.

### **5.1 Enforcement agency roles and relationship**

As pointed out in section 2 above, responsibility for enforcement of Australia’s new cartel regime will be divided between two agencies – assigning investigation, instigation of civil proceedings and referral for prosecution to the ACCC, and prosecution, including both the decision to prosecute and the carriage of the prosecution, to the DPP. This is to be compared with an integrated model in which the same agency performs both investigatory and prosecutorial functions and makes all of the relevant decisions pertaining to these functions, best exemplified by the United States’ Department of Justice Antitrust Division.<sup>150</sup>

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<sup>148</sup> As pointed out in C Beaton-Wells and B Fisse, ‘Criminalising Serious Cartel Conduct: Issues of Law and Policy’ (2008) 36 *Australian Business LRev* 166, 179.

<sup>149</sup> B Fisse, ‘Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008’ (20 January 2009) 30, at [http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/submissions/sub05.pdf](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf), last viewed 29 May 2009.

<sup>150</sup> For a description of the structure of the Division and the roles of its sections and offices, see <http://www.usdoj.gov/atr/sections.htm#nces>. This is not to say that the Division does not work with other agencies, including other antitrust agencies (particularly the Federal Trade Commission), as well as general investigatory and prosecutorial agencies (such as the Federal Bureau of Investigations and US Attorneys and US State Attorneys). However, ultimate authority for all criminal antitrust matters rests with the Assistant Attorney General in charge of the Antitrust Division. For a description of the relationships between the Division and other agencies, see United States Department of Justice, *Antitrust*

The bifurcated enforcement model reflects the value attributed to independence (including independence from the political process) and consistency in prosecutorial decision-making across the full spectrum of federal criminal offences in Australia.<sup>151</sup> In the regulatory context, in Australia separation of the investigatory and prosecutorial functions is seen as having the benefit of utilizing the domain-specific expertise and experience of a regulator in investigating potential offences, while retaining independence and consistency in the ultimate decision to prosecute by assigning this responsibility to the centralized stand-alone prosecutions agency.<sup>152</sup>

At the same time there is potential for inefficiency, at best, and conflict generating sub-optimal outcomes, at worst, as a result of having two agencies with traditionally divergent cultures, priorities and perspectives involved in enforcement.<sup>153</sup> Thus, as counseled by the International Competition Network, the effectiveness of the bifurcated system will depend in large part on the extent to which there is a ‘shared philosophy about the seriousness of cartel conduct, shared priorities in prosecuting cartel activity and open and constant communication’<sup>154</sup> between the two agencies.

The Canadian experience is proof that a bifurcated system can work. While their roles are clearly distinguished, in practice, staff of the Competition Bureau and the DPP’s office in Canada reportedly liaise regularly and cooperate closely on cartel cases, and the system

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*Division Manual*, ch VII, at <http://www.usdoj.gov/atr/foia/divisionmanual/ch7.htm>, last viewed 14 July 2008.

<sup>151</sup> See, eg D Bugg, ‘The Independence of the Prosecutor and the Rule of Law’ (Paper presented at the Rule of Law: The Challenges of a Changing World, Brisbane, 31 August - 1 September 2007), at <http://www.cdpp.gov.au/Director/Speeches/20070831db.aspx>, last viewed 14 July 2008. Self-evidently, the model does not embrace separation of investigatory and prosecutorial functions as a mechanism for promoting impartiality and fairness in the criminal justice system. It also true to say that the extent of largely unchecked prosecutorial discretion in the United States, relating to who will be charged, the crimes with which they will be charged and to a significant degree the punishment to which they will be subject, has attracted substantial criticism: see, eg J Vorenberg, ‘Decent Restraint of Prosecutorial Power’ (1980-1) 94 *Harvard LRev* 1521; M Simons, ‘Prosecutors as Punishment Theorists: Seeking Sentencing Justice’ (Legal Studies Research Paper Series, Paper No 08-0098, St John’s University, March 2008), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1101529](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101529), last viewed 21 July 2008; D Richman, ‘Prosecutors and their agents, agents and their prosecutors’ (2003) 103 *Columbia LRev* 749; B Green and F Zacharas, ‘Prosecutorial Neutrality’ [2004] *Wisconsin LRev* 837. Recently, there has been particular criticism of prosecutorial abuses in plea bargaining with corporate entities, including through the use of deferred and non-prosecution agreements: see, eg E Paulsen, ‘Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements’ (2007) 82 *New York U LRev* 1434.

<sup>152</sup> Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (March 2003) [9.44]–[9.45].

<sup>153</sup> See the discussion in Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (March 2003) ch 9, esp 350-351 [9.35]–[9.40].

<sup>154</sup> International Competition Network, ‘Drafting and Implementing an Effective Leniency Program’ in *Anti-Cartel Enforcement Manual, Cartel Working Group Subgroup 2: Enforcement Techniques* (April 2006) 10 [2.6.7], at [http://www.internationalcompetitionnetwork.org/media/library/conference\\_5th\\_capetown\\_2006/FINALFormattedChapter2-modres.pdf](http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/FINALFormattedChapter2-modres.pdf), last viewed 29 May 2009.

has been said to work smoothly.<sup>155</sup> In particular, it appears that while the DPP retains ultimate independence in decision-making, there is a high degree of consultation with the Bureau throughout the enforcement process, including in the critical areas of immunity policy, settlement or plea bargaining pursuant to cooperation (or leniency as it is referred to in Canada) policy and sentencing.<sup>156</sup>

In the Australian context, there is precedent for cooperation between the ACCC and the DPP in relation to the consumer protection provisions of the TP Act, the breach of some of which carries criminal penalties,<sup>157</sup> as well as in relation to offences associated with obstruction of investigations.<sup>158</sup> However, criminal prosecutions in these areas have been rare<sup>159</sup> and hence it is true to say that with the introduction of the criminal cartel regime, the ACCC and DPP are entering substantially uncharted territory. Certainly, cartel cases are likely to be more complex and challenging than any others on which the two agencies have worked together previously. There has been some acknowledgement of this in joint appearances and public statements by ACCC and DPP representatives in recent months.<sup>160</sup> Every effort is being made to present a united front.<sup>161</sup>

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<sup>155</sup> See, eg the account given in P Crampton, 'Canada's New Competition Law Immunity Policy - Warts and All' (2001) 27 Intl Tax J 22.

<sup>156</sup> Canadian Competition Bureau, *Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases* (25 March 2009), at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html#\\_ftn1](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html#_ftn1), last viewed 29 May 2009.

<sup>157</sup> See TP Act, Pt V.

<sup>158</sup> See TP Act, ss 154R(2), 155(5).

<sup>159</sup> In relation to consumer protection prosecutions, see C Parker and N Stepanenko, 'Compliance and Enforcement Project: Preliminary Research Report' (Preliminary Research Report, Centre for Competition and Consumer Policy, Regulatory Institutions Network, Australian National University, 2003) 23, at <http://www.cccp.anu.edu.au/Preliminary%20Research%20Report.pdf>, last viewed 21 July 2008. There have been very few obstruction prosecutions; however, they include among them the recent high profile charges brought against Richard Pratt in connection with evidence he gave in response to a s 155(1) notice concerned the price-fixing cartel between his company Visy and competitor Amcor that led to record-level penalties in November 2007. For background, see M Drummond, 'Pratt caught in his own web', *Australian Financial Review* (21–22 June 2008) 30.

<sup>160</sup> For example, members of both agencies will participate in discussion of the new cartel regime in three competition law conferences in Australia in 2009. See also the statement in M Bezzi, 'The conduct of cartel litigation: The ACCC enforcement perspective on serious cartels – some key issues and practical considerations' (Paper presented at the Competition Law Conference, Sydney, 23 May 2009): 'The ACCC and CDPP have been working very closely together to prepare for the criminalization of cartel conduct' and in International Competition Network, '2008-2009 Member Materials for Conference Call Series', Prepared by Cartel Working Group, Legal Framework Subgroup, Presented at the 8<sup>th</sup> Annual Conference of the ICN, Zurich, June 2009, p3: 'Given the dual enforcement model with the DPP, [the ACCC] made a concerted effort to advance policy and legislative issues together with the DPP.' There was no public evidence of such joint advancement – not surprisingly, perhaps, given it is not the DPP's policy to speak publicly on such issues. It must be assumed therefore that the advancement referred to was undertaken privately in consultation with Treasury and the Minister.

<sup>161</sup> This was particularly so in connection with the decision to drop criminal charges for obstruction of an ACCC investigation into the Visy/Amcor cartel against Richard Pratt in the days before his death, generating substantial criticism directed largely at the ACCC for deciding to refer the matter for prosecution in the first place having previously settled the civil cartel case against Visy. See 'Watchdog

The historically fractured and tense relationship between the Australian corporate regulator, the Australian Securities and Investments Commission (ASIC), and the DPP is evidence of how the separation of roles, absent a positive intra-agency working relationship, can undermine enforcement efforts.<sup>162</sup> For example, it has been reported that ASIC has been frustrated by the number of cases rejected for trial by the DPP.<sup>163</sup> At the same time, ASIC has been criticized for not bringing enough criminal proceedings generally,<sup>164</sup> as well as for failing to refer matters to the DPP for criminal charges in previous high profile cases, the most well known of which is the case involving Australian celebrity figure and businessman, Steve Vizard.<sup>165</sup> ASIC's handling of the Vizard case led to an unseemly public spat between the corporate regulator and the DPP.<sup>166</sup> That controversy led to a revised Memorandum of Understanding between the two agencies in an attempt to avoid recurrence of such episodes in the future.<sup>167</sup>

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receives very painful bite', *The Age* (28 April 2009) 4; 'ACCC pursuit of Pratt raises many questions', *Sydney Morning Herald* (30 April 2009) 5; 'Deceit could haunt the ACCC', *The Age* (29 April 2009) 14; 'Australia needs a better way to fight price-fixers', *The Age* (1 May 2009) 12; 'Farewell to all that', *The Age* (2 May 2009) 3. Cf 'Politicians should defend the public interest, not Pratt's reputation', *Sydney Morning Herald* (1 May 2009) 11. The ACCC issued a press release in its defense: see Australian Competition and Consumer Commission, 'ACCC comments on Pratt proceedings' (Press Release # NR 095/09, 29 April 2009), at <http://www.accc.gov.au/content/index.phtml/itemId/870590>, last viewed 29 May 2009. Subsequently, in response to particularly hard-hitting criticism by Pratt's lawyer, the DPP too issued a defensive statement: C Craigie, 'Pratt case reasonable', *Australian Financial Review* (20 May 2009) 55. Subsequently, the CDPP defended the ACCC from criticisms that, with criminal powers, it would have too much leverage in civil settlements, in evidence before a Senate committee: see the report in 'Cth DPP quizzed on criminal cartel procedures', 1 June 2009, *Lawyers Weekly*.

<sup>162</sup> See the account given of the ASIC-DPP conflict in P Wood, 'Prosecutorial Predicament', *Australian Financial Review* (1 June 2006) 62.

<sup>163</sup> I McIlwraith, 'Watchdog bares teeth at insurers', *The Age* (26 February 2001) 1.

<sup>164</sup> See, eg V Comino, 'The Enforcement Record of ASIC since the introduction of the civil penalty regime' (2007) 20 *Australian J of Corporate Law* 183; V Comino, 'Civil or Criminal Penalties for Corporate Misconduct: Which way ahead?' (2006) 34 *Australian Business LRev* 428; J Overland, 'Two Steps Forward, One Step Back: Assessing Recent Developments in the Fight Against Insider Trading' (2006) 24 *Company and Securities LJ* 207.

<sup>165</sup> For background, see I Ramsay, 'Steve Vizard, Insider Trading and Directors' Duties', at <http://72.14.235.132/search?q=cache:n4KELZPsTqUJ:cclsr.law.unimelb.edu.au/download.cfm%3FDownloadFile%3D5BF551EC-1422-207C-BA6121FC3121ACAD+Ramsay+insider+trading+directors+%22Steve+Vizard%22&cd=1&hl=en&ct=clnk&gl=au>, last viewed 29 May 2009. For criticism of ASIC for 'going soft' on Vizard, see, eg S Quo, 'Flaws in ASIC's decision on Vizard', *The Age* (12 July 2005) 8; J Sexton, 'Vizard was too well-connected for jail', *The Australian* (6 July 2005) 1; R Gluyas and B Speedy, 'ASIC should have tried to jail Vizard', *The Australian* (30 July 2005) 8; J McCullough, 'One law for rich, another for richer', *The Courier Mail* (30 July 2005) 27; 'Vizard a true insider says Rivkin's lawyer' *Sydney Morning Herald* (6 July 2005) 23.

<sup>166</sup> 'ASIC says it did not go soft on Vizard', *AAP Bulletins* (6 July 2005); 'Decision to skip charges wasn't ours', *The Australian* (7 July 2005) 5; 'Don't blame us, it's the system says ASIC', *The Age* (9 July 2005) 7; 'ASIC sought charges', *Herald Sun* (11 July 2005) 72; 'Watchdog backs DPP to make a decision', *The West Australian* (19 July 2005) 40.

<sup>167</sup> *Memorandum of Understanding between Australian Securities and Investments Commission and Commonwealth Director of Public Prosecutions* (1 March 2006), at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/mou\\_dpp\\_mar\\_2006.pdf/\\$file/mou\\_dpp\\_mar\\_2006.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/mou_dpp_mar_2006.pdf/$file/mou_dpp_mar_2006.pdf), last viewed 29 May 2009.

The only publicly available enforcement guidelines relating to the cartel regime to date are those contained in the ACCC/DPP MOU which, for the reasons outlined below, provide limited guidance. In terms of managing the relationship between the ACCC and the DPP, three layers of liaison are contemplated in the ACCC/DPP MOU at the levels of individual cases, regular ongoing review of the organisational relationship in an operational sense and general oversight of the inter-agency relationship.<sup>168</sup> Organisational relationship managers have been appointed and their roles are summarised in the ACCC/DPP MOU.<sup>169</sup> It is debatable, however, whether the MOU is sufficiently detailed or prescriptive in relation to these liaison arrangements and mechanisms for both preventing and resolving disagreements if and when they inevitably arise.<sup>170</sup> While it should not be predicted that things will go wrong in the relationship, the ASIC/DPP experience indicates that such eventualities should be provided for so as to facilitate the smooth and expeditious resolution of disputes if and when they arise.

## 5.2 Enforcement decision-making

The scheme of overreaching parallel criminal and civil prohibitions to be introduced by the CC & OM Bill has the consequence that significant power is vested in the ACCC and DPP to determine when to pursue a matter as a potential offence and when otherwise to deal with it as a potential civil violation. To date, the only guidance on how such determinations will be made in the specific context of cartel conduct is in the ACCC/DPP MOU.<sup>171</sup> Reflective of Australian distrust of administrative power generally,<sup>172</sup> the MOU has been criticized for failing to provide adequate guidance on how the ACCC and DPP

<sup>168</sup> *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* (2008) [8], at <http://www.cdpp.gov.au/Media/Releases/20081201-ACCC-and-CDPP-Cartel-Conduct-Immunity-MOU.pdf>, last viewed 12 January 2009.

<sup>169</sup> *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* (2008) [8.2], at <http://www.cdpp.gov.au/Media/Releases/20081201-ACCC-and-CDPP-Cartel-Conduct-Immunity-MOU.pdf>, last viewed 12 January 2009.

<sup>170</sup> Cf the provisions in the *Memorandum of Understanding between Australian Securities and Investments Commission and Commonwealth Director of Public Prosecutions* (1 March 2006) 3-4 [6.1]-[6.8], at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/mou\\_dpp\\_mar\\_2006.pdf/\\$file/mou\\_dpp\\_mar\\_2006.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/mou_dpp_mar_2006.pdf/$file/mou_dpp_mar_2006.pdf), last viewed 29 May 2009.

<sup>171</sup> The ACCC has a general *Compliance and Enforcement Policy* but it applies to enforcement of all of the TP Act and is not to specific anti-competitive conduct, let alone cartels. It makes no mention of the approach taken by the ACCC to criminal enforcement. See Australian Competition and Consumer Commission, *Compliance and enforcement policy* (2009), at [http://www.accc.gov.au/content/item.phtml?itemId=867964&nodeId=38f33e126b23258f0b320d83e4009709&fn=Compliance and enforcement policy.pdf](http://www.accc.gov.au/content/item.phtml?itemId=867964&nodeId=38f33e126b23258f0b320d83e4009709&fn=Compliance%20and%20enforcement%20policy.pdf), last viewed 29 May 2009.

<sup>172</sup> See, eg AM Gleeson AC, 'Police Accountability and Oversight: An Overview', at <http://www.walk.com.au/pedestriancouncil/Page.asp?PageID=339>, last viewed 29 May 2009; Roger Douglas, *Douglas and Jones's Administrative Law* (6<sup>th</sup> edn, The Federation Press, 2009) 8.

will approach enforcement of the new provisions.<sup>173</sup> Implicitly accepting of these criticisms, the Senate Economics Committee that reviewed the CC & OM Bill recommended that the ACCC release detailed guidelines that would provide business with greater certainty regarding the types of behaviour likely to be prosecuted.<sup>174</sup> ACCC representatives subsequently indicated that this would be done.<sup>175</sup> However, as at the date of writing, such guidelines are yet to be published.<sup>176</sup>

In relation to the topics that it does purport to cover, the information provided in the ACCC/DPP MOU is incomplete or unclear. There is scant guidance offered, for example, on the approach taken by the ACCC in deciding whether to launch a criminal investigation. The important related question of how evidence collection for a civil proceeding may affect a potential criminal investigation or prosecution receives minimal treatment.<sup>177</sup> Detailed guidelines on criminal investigations appear to have been anticipated but, as yet, there is no sign that they have been or are being prepared.<sup>178</sup>

<sup>173</sup> In response to such concerns, the ACCC has pointed to safeguards against a miscarriage in its discretion, including the independent assessment of the DPP, the committal process and the burden of proof beyond a reasonable doubt that will lay heavily on the prosecution to establish its case before a jury. However, the existence of such safeguards will be of little comfort to a defendant who has been unjustifiably subjected to the disruption, stress and stigma associated with a criminal investigation, even less having been publicly charged on indictable offences and subjected to a committal proceeding or, worse, trial.

<sup>174</sup> Senate Standing Committee on Economics, *Report on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (2009), 32-33 [4.9]-[4.10] Recommendation 1, at [http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_cartels\\_09/report/report.pdf](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/report/report.pdf), last viewed 29 May 2009).

<sup>175</sup> S Court, 'Cartels, Consumers and the Role of the Regulator – Proposed Changes to the Trade Practices Act' (Paper presented at the Competition and Trade Practices Summit, Sydney, 12 March 2009) 6, at <http://www.accc.gov.au/content/index.phtml/itemId/865206>, last viewed 29 May 2009; M Bezzi, 'The conduct of cartel litigation: The ACCC enforcement perspective on serious cartels – some key issues and practical considerations' (Paper presented at the Competition Law Conference, Sydney, 23 May 2009) 1 (suggesting that they will only be published after enactment of the new law).

<sup>176</sup> Note also the admission by the DPP that the ACCC is yet to settle a protocol for referrals for prosecution: see 'Cth DPP quizzed on criminal cartel procedures', 1 June 2009, *Lawyers Weekly*. Cf the Canadian Competition Bureau, *Draft Competitor Collaboration Enforcement Guidelines*, at [http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf/\\$FILE/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf](http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf/$FILE/Competitor-Collaboration-Guidelines-2009-05-08-e.pdf), last viewed 29 May 2009 that have been published for comment, when the amended legislation will only take effect in March 2010.

<sup>177</sup> *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* (2008) [6.2], at <http://www.cdpp.gov.au/Media/Releases/20081201-ACCC-and-CDPP-Cartel-Conduct-Immunity-MOU.pdf>, last viewed 12 January 2009 which states: 'The DPP and ACCC will ensure that such matters are managed in an integrated fashion, including through the adoption of measures to avoid any potential for civil proceedings conducted by the ACCC to adversely affect a related criminal investigation or prosecution.'

<sup>178</sup> Cf Office of Fair Trading, *Powers for investigating criminal cartels*, Guidance note (January 2004), at [http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/enterprise\\_act/oft515.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft515.pdf), last viewed 29 May 2009; Office of Fair Trading, *Covert Human Intelligence sources in cartel investigations*, Code of Practice (OFT379, August 2004), at [http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/general/oft739.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/general/oft739.pdf), last viewed 29 May 2009; Office of Fair Trading, *Under Investigation? A guide to investigations by the OFT under the Competition Act 1998* (2005), at

The criteria identified in the ACCC/DPP MOU as relevant to the ACCC's decision to refer a matter for prosecution and the DPP's decision to prosecute (duration and extent of the conduct, effects on the market and the public, and prior similar conduct) are expressed at the highest level of generality.<sup>179</sup> A virtually meaningless threshold of more than AU\$1 million value of affected commerce has been set.<sup>180</sup> There are additional criteria contained in other policy documents (including in the ACCC's general Compliance and Enforcement Policy and the DPP's general Prosecution Policy).<sup>181</sup> It is unclear how the various criteria in these policy documents are intended to interact with each other. While the ACCC/DPP MOU indicates that all such criteria will be relevant, no attempt is made to order or prioritize them in any way.<sup>182</sup>

There are also significant gaps in the ACCC/DPP MOU. No reference is made to a number of matters that one would expect to find in such a document – for example: the question of when a prosecution should be instituted against (a) an individual, (b) a corporation only, or (c) an individual and a corporation;<sup>183</sup> information sharing and the treatment of confidential information as between the ACCC and the DPP and between these agencies and foreign enforcement authorities;<sup>184</sup> the approach that will be taken to

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[http://www.oft.gov.uk/shared\\_of/business\\_leaflets/ca98\\_mini\\_guides/oft426.pdf](http://www.oft.gov.uk/shared_of/business_leaflets/ca98_mini_guides/oft426.pdf), last viewed 29 May 2009.

<sup>179</sup> *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* (2008) [4.4], at <http://www.cdpp.gov.au/Media/Releases/20081201-ACCC-and-CDPP-Cartel-Conduct-Immunity-MOU.pdf>, last viewed 12 January 2009

<sup>180</sup> *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* (2008) [4.4], at <http://www.cdpp.gov.au/Media/Releases/20081201-ACCC-and-CDPP-Cartel-Conduct-Immunity-MOU.pdf>, last viewed 12 January 2009. Cf the observation in a recent speech by the ACCC's Executive General Manager, Enforcement and Compliance, that the ACCC will only seek to have 'serious cartel conduct' prosecuted which means 'conduct that has the potential to cause large scale or serious economic harm' (M Bezzi, 'The conduct of cartel litigation: The ACCC enforcement perspective on serious cartels – some key issues and practical considerations' (Paper presented at the Competition Law Conference, Sydney, 23 May 2009) 8).

<sup>181</sup> Adding to the confusion is the comment by the ACCC's Executive General Manager, Enforcement and Compliance, that 'for serious cartel investigations... if the tests under the *Prosecution Policy of the Commonwealth* are satisfied, it should be clear to everyone that the ACCC will always support a criminal prosecution' (see M Bezzi, 'The conduct of cartel litigation: The ACCC enforcement perspective on serious cartels – some key issues and practical considerations' (Paper presented at the Competition Law Conference, Sydney, 23 May 2009) 9).

<sup>182</sup> Cf the comment that the criteria will be approached in a 'holistic' way: M Bezzi, 'The conduct of cartel litigation: The ACCC enforcement perspective on serious cartels – some key issues and practical considerations' (Paper presented at the Competition Law Conference, Sydney, 23 May 2009) 9.

<sup>183</sup> Cf United States Department of Justice Memorandum from Deputy Attorney General Paul McNulty to all United States Attorneys on the Principles of Federal Prosecution of Business Organizations (copy on file with author).

<sup>184</sup> According to the ALRC, this is an issue dealt with in other memoranda of understanding between the DPP and regulators: Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (March 2003) [9.52], at [http://www.austlii.edu.au/au/other/alrc/publications/reports/95/09.Regulators\\_and\\_the\\_DPP.html#headin](http://www.austlii.edu.au/au/other/alrc/publications/reports/95/09.Regulators_and_the_DPP.html#headin)

bail and in particular the extent to which the DPP might consult with and consider the ACCC's views on this matter;<sup>185</sup> the circumstances, if any, where a prosecution will be brought for the offence of conspiracy to commit a cartel offence, conspiracy to defraud a Commonwealth entity,<sup>186</sup> the offence of money laundering, or an offence of obstruction of justice either instead of a cartel offence or together with a cartel offence.<sup>187</sup>

On a more positive note, a major concern raised early in the debate concerning reconciliation of the DPP's approach to immunity from prosecution with the ACCC's approach has been addressed. Based on the hallmark traits of maximum certainty and minimum discretion, the ACCC Immunity Policy is designed to meet the particular challenges of detecting and proceeding against cartel conduct consistent with the approach taken by antitrust enforcers around the world.<sup>188</sup> By contrast, reflecting maximum discretion and minimum certainty consistent with a traditional prosecutorial approach, the DPP's general policy in determining when to prosecute is to assess whether there is a reasonable prospect of conviction and if so whether it is in the overall public interest to prosecute (or not prosecute as the case may be).<sup>189</sup>

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[g2](#), last viewed 29 May 2009. It was an issue about which the Law Council Trade Committee has been particularly concerned: see Law Council of Australia, 'Submission to Treasury on the Criminal Penalties for Serious Cartel Conduct – Draft Legislation' (5 March 2008) [167], [214]-[220], at [http://www.treasury.gov.au/documents/1350/PDF/LCA\\_Trade\\_Practices\\_Committee.pdf](http://www.treasury.gov.au/documents/1350/PDF/LCA_Trade_Practices_Committee.pdf), last viewed 29 May 2009.

<sup>185</sup> Cf *Memorandum of Understanding between Australian Securities and Investments Commission and Commonwealth Director of Public Prosecutions* (1 March 2006) 5 [9.1], at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/mou\\_dpp\\_mar\\_2006.pdf/\\$file/mou\\_dpp\\_mar\\_2006.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/mou_dpp_mar_2006.pdf/$file/mou_dpp_mar_2006.pdf), last viewed 29 May 2009.

<sup>186</sup> See the discussion in B Fisse, 'The Australian Cartel Criminalisation Proposals: An Overview and Critique' (2007) 4(1) *Competition LRev* 51, 68-69. For a recent example of a prosecution involving joint counts of price fixing and money laundering in the United States, see Department of Justice, 'New Jersey Man Charged in Tomato Industry Probe with Racketeering, Money Laundering and Antitrust Violations' (Press Release, 10 December 2008), at [http://www.usdoj.gov/atr/public/press\\_releases/2008/240238.htm](http://www.usdoj.gov/atr/public/press_releases/2008/240238.htm), last viewed 12 January 2009.

<sup>187</sup> See the discussion on 'linked liability' in C Beaton-Wells and B Fisse, 'Criminal Cartels: Individual Liability and Sentencing' (Paper presented at the 6<sup>th</sup> Annual University of South Australia Trade Practices Workshop, 17-18 October 2008).

<sup>188</sup> See the somewhat hyperbolic declaration by the Deputy Assistant Attorney-General for Criminal Enforcement in the Antitrust Division of the United States Department of Justice: 'Unquestionably, leniency programmes are the greatest investigative tool ever designed to fight cartels': S Hammond, 'Preface: US Department of Justice' in K Arquit, J Buhart and O Antoine, *Leniency Regimes* (2<sup>nd</sup> edn, European Lawyer, 2007) pvii. A more objective indicator of the high regard in which such policies are held is the fact that today more than 40 jurisdictions have some type of immunity program: see International Competition Network, Cartel Working Group, Subgroup 1 - General Legal Framework, 'Cartel Settlements' (Report to the ICN Annual Conference, April 2008) 5-6, at [http://www.icn-kyoto.org/documents/materials/Cartel\\_WG\\_1.pdf](http://www.icn-kyoto.org/documents/materials/Cartel_WG_1.pdf), last viewed 29 May 2009.

<sup>189</sup> See Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1992) [2.7]-[2.10], at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>, last viewed 29 May 2009.

Recognising the difficulties that application of the DPP's policy would pose for immunity in the cartel context in circumstances where the DPP is the final decision-maker on such matters, the ACCC/DPP MOU provides for the ACCC to receive and manage requests for immunity from both criminal and civil proceedings, and make recommendations to the DPP based on the ACCC's assessment as to whether the applicant for immunity meets the criteria set out in the ACCC's Immunity Policy in relation to cartel conduct.<sup>190</sup> The DPP will then make an independent assessment and decide whether to grant immunity from criminal proceedings in accordance with its general policy. Significantly, however, an Annexure has been added to that policy which makes it clear that, in making that decision, the DPP will apply the same conditions as apply under the ACCC Immunity Policy and that the DPP's decision will be communicated to the applicant at the same time as the ACCC's decision on civil immunity.<sup>191</sup> This is the first occasion on which the DPP's Prosecution Policy has been revised in such a substantive way to accommodate 'special' concerns arising in connection with a particular offence. It was a significant concession on the part of the DPP, and would have been a confidence-booster for the ACCC and a source of relief to the Minister, meaning one less controversy of the many that he has confronted in the criminalization debate to date.

That said, the question of how defendants who are not eligible for immunity but nevertheless wish to cooperate will be dealt with remains unresolved. The ACCC has a general Cooperation Policy for Enforcement Matters under which it negotiates with cooperating defendants.<sup>192</sup> Particularly under its current Chairman, the ACCC has demonstrated a preference for settlement over contested litigation,<sup>193</sup> and a large proportion of cartel cases have been resolved in this way, even if at the expense of higher penalties and the precedential value that might flow from greater judicial input on matters of both liability and penalty assessment. In return for cooperation under the policy, the

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<sup>190</sup> *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* (2008) s 7, at <http://www.cdpp.gov.au/Media/Releases/20081201-ACCC-and-CDPP-Cartel-Conduct-Immunity-MOU.pdf>, last viewed 29 May 2009.

<sup>191</sup> See Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1992) Annexure B, at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>, last viewed 29 May 2009.

<sup>192</sup> Australian Competition and Consumer Commission, *Cooperation Policy for Enforcement Matters* (July 2002), at <http://www.accc.gov.au/content/item.phtml?itemId=459482&nodeId=e8e554f0fed6c4139e99fb67c9f75eae&fn=ACCC%20cooperation%20policy%20July%202002.pdf>, last viewed 29 May 2009.

<sup>193</sup> 'ACCC Boss Backs Away from Litigation', *Australian Financial Review* (4 June 2004) 1; Graeme Samuel, 'Heal Thyself: Voluntary Compliance is Much Better than Prosecution', *BRW* (Melbourne) (9 October 2003) 50; 'Fewer ACCC Court Cases Raises Concerns', *Australian Financial Review* (31 January 2008) 10.

ACCC offers a range of incentives, the most common of which involves preparation of an agreed statement of facts that is tightly drafted in such a way as to minimise admissions that might encourage private follow-on actions for damages,<sup>194</sup> and a submission on penalties that are jointly presented to the court and invariably receive judicial endorsement.<sup>195</sup>

This approach is far removed from the DPP's approach to charge negotiations, as they are called under the DPP's Prosecution Policy.<sup>196</sup> In Australia, there is no direct counterpart to the structured process of plea bargaining that exists in United States.<sup>197</sup> The phrase, 'plea bargaining', as used in the United States to reflect an exchange of concessions leading to an outcome based on bargaining rather than the merits, is avoided in Australia.<sup>198</sup> In Australia, by contrast, plea discussions are described as 'an informal, semi-adversarial, semi-co-operative process which attempts, in a situation of uncertainty, to identify the facts which can be proved beyond a reasonable doubt and the charge which most appropriately reflects the facts, to the satisfaction of both the prosecution and defence'.<sup>199</sup> Furthermore, in the United States, discussions between the prosecution and defence often involve the judge and judges rarely reject the prosecutor's recommendations as to sentence. In Australia, there is no judicial involvement in the content of plea discussions in Australia and the judge is not bound in any way to accept counsel's recommendations as to sentence.<sup>200</sup> There are also no sentencing guidelines

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<sup>194</sup> As was apparent from the negotiations of the settlement of the Visy cartel case: see the evidence summarized in *Australian Competition and Consumer Commission v Pratt [No 4]* [2009] FCA 416, [33]-[35].

<sup>195</sup> See generally *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285. Cf the emphasis on independent judicial assessment in *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR ¶41-993, discussed in C Beaton-Wells, 'Judicial scrutiny of penalty agreements to increase: Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd [2004] ATPR 41-993' (2005) 13 Trade Practices LJ 59.

<sup>196</sup> See Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1992) [6.14]-[6.21], at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>, last viewed 29 May 2009.

<sup>197</sup> In the United States over 90 per cent of corporate defendants charged with an antitrust offence enter into plea agreements: Organization for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs Competition Committee, *Plea Bargaining/Settlement of Cartel Cases*, DAF/COMP(2007)38 (22 January 2008) 149, at <http://www.oecd.org/dataoecd/12/36/40080239.pdf>, last viewed 29 May 2009.

<sup>198</sup> P Sallmann, *Report on Criminal Trials: Shorter Trials Committee* (Australian Institute of Judicial Administration, 1989) 74.

<sup>199</sup> K Mack and SR Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995) 6.

<sup>200</sup> K Mack and SR Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995) 5.

which, even in advisory form,<sup>201</sup> support the process by making the outcomes readily predictable to both prosecutors and defendants.<sup>202</sup>

In the context of ‘charge negotiations’, the criteria that the DPP considers in deciding whether to accept a defence plea are more wide-ranging than under the ACCC Cooperation Policy and the outcomes of the DPP’s assessment are necessarily far less certain.<sup>203</sup> There is no concept of a graduating discount dependent on the timing or level of cooperation offered.<sup>204</sup> The DPP does not participate in joint submissions on penalty to a court, but may agree not to oppose a defence submission on an appropriate sentence.<sup>205</sup> These differences could well be material in shaping the future approach to the ‘settlement’ of cartel cases. One can expect settlements to take longer and be fewer in number. Defendants are likely to be more reluctant to negotiate and this will have implications for the ACCC’s enforcement record. Given this, it is surprising that the ACCC/DPP MOU on how to handle the new cartel provisions does not address the issue of settlement or plea negotiation,<sup>206</sup> and it is anticipated that this will be an area in which the strength of the inter-agency relationship will be tested.<sup>207</sup>

<sup>201</sup> See *US Sentencing Guidelines Manual* (2004) 2R1.1, cmt N.3. Since *United States v Booker* 543 US 220, 245 (2005) these guidelines are advisory only. However, the Antitrust Division of the Department of Justice continues to seek sentences within the ranges suggested by the Sentencing Guidelines and courts continue to compute sentences under the Guidelines in sentencing proceedings. See S Hammond, ‘Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants’ (Paper presented at the ABA Section of Antitrust Law Spring Meeting, Washington DC, 30 March 2005), at <http://www.usdoj.gov/atr/public/speeches/208354.pdf>, last viewed 29 May 2009.

<sup>202</sup> Recognizing this there has been consideration of ways to heighten the transparency and certainty of plea discussions in Australia, including through the use of sentencing indication schemes. See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (April 2006) 411-412. By and large however, the apparent consensus is that the current form of prosecutorial guidelines (of which the *Prosecution Policy* is largely representative) are sufficient; that to formalize the discussions would risk discouraging them and would be too bureaucratic and inflexible; and that professional ethics and the potential for appeals are adequate controls (see Standing Committee of Attorneys-General, *Deliberative Forum on Criminal Trial Reform: Report* (June 2000) 60, at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~xxforumreport.pdf/\\$file/xxforumreport.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~xxforumreport.pdf/$file/xxforumreport.pdf), last viewed 7 May 2008; SR Anleu and K Mack, ‘Pleading Guilty and Professional Relations in Australia’ (2001) 22 *Justice System Journal* 155, 170).

<sup>203</sup> See the list of 12 factors in Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1992) [6.18], at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>, last viewed 29 May 2009. Note that they include ‘the views of the referring agency or department.’

<sup>204</sup> Cf Canadian Competition Bureau, *Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases* (25 March 2009) 27, at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html#\\_ftn1](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html#_ftn1), last viewed 29 May 2009. Under the United States’ *Sentencing Guidelines*, acceptance of responsibility by a plea of guilty or statements indicating acceptance of responsibility and the admission of guilt may lower the offense level by two or three levels: *US Sentencing Guidelines Manual* (2004) 2R1.1, cmt N.3.

<sup>205</sup> See Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1992) [6.21], at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>, last viewed 29 May 2009.

<sup>206</sup> Recent statements by the ACCC Executive General Manager, Enforcement and Compliance, have done little to clarify matters – on the one hand, indicating that the ACCC will not negotiate a civil settlement when criminal prosecution is available, but on the other hand, stating that for parties ineligible for

## 6. Conclusion

As a matter of general policy or principle there appears to be a growing international consensus that cartel conduct warrants criminal sanctions. However, as borne out by the Australian experience, the process by which a country decides to criminalize and the issues that arise in the design of a criminal cartel regime are far less likely to be generalizable or, for that matter, transferable amongst jurisdictions. In short, there are likely to be many different strains of the criminalization contagion.

In Australia the challenges involved in criminalization have been as much political as they have been legal or practical. Under a conservative government, despite the best persuasive efforts of a high profile regulator, political ambivalence towards the notion of treating cartellists as criminal stalled the process of legislative development for over four years, and may have stalled it interminably had it not been for the landmark Visy settlement, uncannily timed during a federal election campaign.<sup>208</sup> Under the Labor government, the process was delayed further, not by lack of political support, but by a commitment by a new Minister to consult and compromise on a range of difficult and technical aspects of the proposed scheme. Over a period of 18 months, two Exposure Drafts of the CC& OM Bill were released, submissions received and published, private consultations conducted and a public parliamentary inquiry held. In this process the majority of commentary was critical and the responses to the criticisms were seen largely as ineffectual.

The criticisms reveal deep-seated divisions amongst stakeholders in Australia as to what conduct should be criminal and how or by which institutions and by what process its criminality should be identified.<sup>209</sup> The debate as to whether dishonesty should be an element of a cartel offence exemplifies this division and perhaps, more profoundly,

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immunity, their circumstances will be 'considered in accordance with the ACCC's Cooperation Policy and with the Prosecution Policy of the Commonwealth' (see M Bezzi, 'The conduct of cartel litigation: The ACCC enforcement perspective on serious cartels – some key issues and practical considerations' (Paper presented at the Competition Law Conference, Sydney, 23 May 2009) 9, 12).

<sup>207</sup> Cf the thorough approach taken in the Canadian Competition Bureau, *Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases* (25 March 2009), at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html#\\_ftn1](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html#_ftn1), last viewed 29 May 2009.

<sup>208</sup> See the comments in A Hoel, 'Crime does not pay but hard-core cartel conduct may: Why should it be criminalised' (2008) 16 Trade Practices LJ 102, 114.

<sup>209</sup> Albeit beyond the scope of this paper, it should be noted that there are divisions also between the Commonwealth and the States and Territories with respect to significant aspects of the statutory scheme. The fault elements of the cartel offences tried in State and Territory courts, for example, will be different to the fault elements of the Commonwealth cartel offences. The rules governing ancillary liability will also differ as between the Commonwealth and each State and Territory. Evidentiary and procedural rules will not be the same in cartel trials held in State and Territory courts to those held in the Federal Court. Sentencing rules and principles will diverge. None of these differences have been canvassed or explained in any public document issued by the Government, Treasury or the ACCC.

demonstrates that the case for criminalizing anti-competitive conduct on the grounds of its harmfulness, as distinct from some notion of immorality, has not convinced all in Australia. The debate about whether the characterization of conduct as criminal or civil should be left largely to administrative agencies reinforces the lack of any clear consensus in this country about what conduct warrants treatment as an offence. Equally, it reflects a degree of trepidation about further empowering the ACCC, seen by some as being too powerful already and as overzealous or dogmatic in the exercise of its power.<sup>210</sup> At the same time, rather than being viewed as a restraining influence, the introduction of the DPP, an agency unknown and inaccessible to most in competition law circles, has only sharpened the nerves.<sup>211</sup>

The criticisms are also in large part a function of long-standing discontent with the approach taken to Australian competition legislation generally. The over-inclusive and simultaneously highly prescriptive and complex formulation of the new prohibitions is symptomatic of the approach taken in relation to many of the prohibitions under the TP Act. In the past it has attracted criticism for creating undue uncertainty for business as well as diverting the attention of adjudicators from applying a purposive and principled approach to statutory interpretation. In the present context, not unexpectedly, those concerns have been heightened given the consequences for individuals prosecuted under the regime, as well as for business and the Australian economy generally. That the new provisions will need to be understood and applied by juries has been an added cause for concern.

There is no doubt that the Australian embrace of criminalization will have flow-on effects for the international movement. Already there are signs of its spread, New Zealand having indicated that it will observe the Australian experience carefully with a view to following suit.<sup>212</sup> However, once a country embarks on the path of examining closely how to accommodate a criminal cartel regime within its existing legislative framework and enforcement institutions, it should quickly become evident that there is no off-the-

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<sup>210</sup> See the findings reported in C Parker and V Nielsen, 'What do Australian businesses think of the ACCC, and does it really matter?' (2007) 35 Federal LRev 187.

<sup>211</sup> Recent scandals surrounding the bungled charges against terrorism suspects would have done little to calm the nerves: see the report of the inquiry held into the treatment of Dr Mohammed Haneef at <http://www.haneefcaseinquiry.gov.au/>.

<sup>212</sup> See, eg the comments in P Rebstock, 'Competition Update' (Paper presented at the Auckland District Law Society's President's Breakfast, Auckland, 7 March 2008), at <http://www.comcom.govt.nz/MediaCentre/Speeches/speechotheaucklanddistrictlawsoci1.aspx>, last viewed 17 July 2008; P Taylor, 'The Application of the Leniency Policy' (Paper presented at the LexisNexis Advanced Competition and Fair Trading Law 2007 Conference, 31 May 2007) 7, at <http://www.comcom.govt.nz/MediaCentre/Speeches/ContentFiles/Documents/The%20Application%20of%20the%20Leniency%20Policy.pdf>, last viewed 8 July 2008; S Ladd, 'Serious cartel conduct – coming to a jail near you?', NZ Lawyer (8 February 2008).

shelf ‘model’ available for adoption.<sup>213</sup> Each jurisdiction will need to navigate the particular political, social, economic and legal challenges involved in deciding to criminalize and, conceivably to an even greater extent, in designing the law and policy that will implement the decision. In each case, depending on how those challenges are met by political leaders and policy-makers, the outcome is likely to be different.

In Australia’s case, despite strong broad-based support for competition policy as well as, it may seem, for the basic idea that cartels should attract criminal sanctions,<sup>214</sup> the process of formulating the new regime has been divisive and the outcome has few public supporters outside of the ACCC. It is difficult to assess what this is likely to mean for the credibility of the criminalization reform going forward. It is conceivable that once the law is enacted, the criticism will dissipate as stakeholders become resigned to dealing with it as best they can. Just as plausibly, the criticism could intensify as the practical reality of the new regime is exposed. One possibility is that the business sector, rather than becoming more compliant, becomes more resistant and actively explores ways in which to avoid the application of the new legislation.<sup>215</sup> However, what is clear is that the approach taken by the ACCC and DPP to authorizations, investigations and prosecutions will be scrutinized closely and that in the courtroom of public opinion, there will be little margin for error, actual or perceived. Any misstep is likely to resurrect the debates that have characterized the legislative process over the last two years and, in the event of a serious blunder, may even re-open the question of whether criminalization was a feasible or appropriate reform in the first instance.

Notwithstanding its distinctiveness, there appear to be two key lessons from Australia’s criminalization experience for other countries. The first is that fundamental questions about the design and enforcement of a criminal cartel regime should be considered at the earliest possible stage – if possible, at the same time that the general issue of whether to

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<sup>213</sup> Even in the case of New Zealand, despite a longstanding tradition of trans-Tasman harmonization, there are significant differences in both its substance and style of antitrust legislation and the Australian TP Act such that the chances of ‘copying’ directly from the Australian cartel legislation are minimal. See generally the discussion in C Beaton-Wells and B Fisse, “Criminal Cartels: Individual Liability and Sentencing”, Paper presented at 6th Annual University of South Australia Trade Practices Workshop, South Australia, October 2008, pp1-133.

<sup>214</sup> As reflected by the fact that none of the submissions to the Senate Economics Committee opposed criminalization as such (as distinct from complaining about the design of the new regime). Notably also, of the 91 submissions made by business to the Dawson Committee, only 17 opposed the ACCC’s proposal. See further the discussion of the degree of business support for criminalization in C Beaton-Wells, ‘Criminalising Cartels: Australia’s Slow Conversion’ (2008) 31 *World Competition: Law & Economics Rev* 205, 215.

<sup>215</sup> As foreshadowed in B Fisse, ‘Avoidance and Denial of Liability for the Cartel Offences: Proactive Lawful Escape Routes Left Open by the Cartel Legislation’, Paper given at Competition Law Conference, Sydney, May 2009, at <http://www.brentfisse.com/publications.html>.

criminalize is under consideration. This is to be contrasted with a sequential approach in which the general decision whether to criminalize is determined first and if decided in the affirmative, then consideration of questions as to the conduct to be made an offence and the institutional responsibility for, policy and mode of enforcement follow.<sup>216</sup> Depending on the country's particular legal and institutional framework, such questions may include:

- what should be the elements of a cartel offence, physical and mental, bearing in mind the objective of criminalizing only 'serious' cartel conduct, as well as the practical constraints of trying such an offence before a jury;
- how would a cartel offence relate to existing civil prohibitions and, in particular, to what extent should it be differentiated on the basis of capturing a narrower and/or different category of conduct;
- what would be appropriate exemptions and defenses for a cartel offence and how should these relate to or be differentiated from exemptions and defenses for civil prohibitions;
- would liability for a cartel offence attach to corporations and/or individuals and to what extent should liability be fault-based as distinct from vicarious;
- what types of penalties should apply for a cartel offence and what are the appropriate maxima;
- which courts would have jurisdiction, what would be the mode of trial for a cartel offence and to what extent would rules of evidence and procedure, different to those in civil proceedings, apply;
- what protection would be available from double jeopardy if the cartel offence applies to substantially the same conduct as the civil prohibitions;
- which agencies would be involved in enforcement of the cartel offence and, if more than one, what would be the roles and relationship between them;
- what would be the implications for policies that are seen as crucial to anti-cartel law enforcement, such as immunity/leniency policy;

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<sup>216</sup> The sequential approach was adopted by Australia, and continues to be advocated by the Australian agencies in international fora: see International Competition Network, '2008-2009 Member Materials for Conference Call Series', Prepared by Cartel Working Group, Legal Framework Subgroup, Presented at the 8<sup>th</sup> Annual Conference of the ICN, Zurich, June 2009, pp9-12.

- what would be the appropriate degree of discretion given to enforcement agencies in determining which conduct to prosecute and how should discretion be structured or confined; and
- what approach would be taken to sentencing and are sentencing guidelines likely to be required.

Any decision to criminalize without considering, at least in a general sense, the questions identified above, inevitably will be a decision driven primarily by politics (that of the government, as well as the regulator, and conceivably the power struggle between them), rather than by an in-depth and informed assessment of the legal and practical implications of criminalization.

The second lesson is that criminalization requires strong political leadership, together with clear public support from the competition enforcement agency. However, even if these preconditions are met, the challenges in terms of the number, complexity and potentially controversial nature of issues involved are likely to be great. Hence, there are likely to be substantial benefits in referring the matter for examination initially by an independent body that has the expertise and capacity to deal with it thoroughly, openly and sensitively. In Australia, such a body would have been the Australian Law Reform Commission. Instead criminalization was dealt with superficially by the Dawson Committee and then handballed to the government which anointed a cartel-like working party, the procedures and findings of which remain secret to this day.

The process conducted by such a body should include, at a minimum, the production and release of a discussion paper raising the issues identified above for consideration, the receipt and publication of submissions, followed by the publication of a comprehensive report with recommendations. The government should respond publicly and in detail to the report and its recommendations. Whether further consultation is required at that stage would depend on the response by stakeholders to the process and the extent to which the recommendations and/or the government's response are qualified or ambiguous in any significant respect. There may well be a case for releasing an exposure draft of the legislation to allow for further reflection with the benefit of having the regime in its proposed statutory form.

If these two lessons are learnt from the Australian experience, the chances are that the criminalization decision will be more informed, the legislative process smoother, the

outcome in terms of the design of the regime more coherent and better supported and ultimately, the prospects of effective enforcement substantially enhanced.