

# CAPTURING THE CRIMINALITY OF HARD CORE CARTELS: THE AUSTRALIAN PROPOSAL

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*[This article reviews the proposal to make serious cartel conduct a criminal offence in Australia. It analyses the extent to which the proposal captures the criminality of the conduct to which it will apply; in particular, its culpability, harmfulness and moral wrongfulness. Two key assumptions underpin this analysis. First, criminalisation makes the morality of serious cartel activity a relevant consideration in the design and application of the new law. Secondly, recognition of the moral dimension will enhance the prospects of the criminal regime securing the support necessary for its effective enforcement. It should also boost the regime's deterrence value by facilitating internalisation of relevant moral norms in the business community. The article concludes that there is still much work to be done in refining and even rethinking aspects of the new offence to ensure that it properly reflects the criminal nature of hard core cartels.]*

## CONTENTS

I	Introduction.....	675
II	Background.....	680
III	Culpability .....	683
IV	Harmfulness .....	689
V	Wrongfulness .....	694
VI	Conclusion .....	701
	A Culpability.....	701
	B Harmfulness .....	702
	C Wrongfulness .....	702

## I INTRODUCTION

It is proposed in Australia to criminalise serious forms of business cartel activity, namely price-fixing, market-sharing, output restriction, and bid-rigging.<sup>1</sup> This proposal was announced by the former Treasurer in 2005<sup>2</sup> and was supported by the then opposition Labor party,<sup>3</sup> recently elected to government. Shortly after the election, Labor officials indicated that criminalising legislation would be introduced within 12 months.<sup>4</sup> In so legislating, Australia will join a worldwide movement towards tougher regulation of cartels and, in particular, the

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<sup>1</sup> Peter Costello, Treasurer of Australia, 'Criminal Penalties for Serious Cartel Behaviour' (Press Release, 2 February 2005).

<sup>2</sup> Ibid.

<sup>3</sup> Doorstop Interview with Wayne Swan (Melbourne, 1 February 2005) <<http://www.alp.org.au/media/0205/dsitre020.php?print=on>>.

<sup>4</sup> Lenore Taylor and Matthew Drummond, 'Business Reform to Be Fast-Tracked', *The Australian Financial Review* (Melbourne), 5 December 2007, 10.

imposition of criminal sanctions.<sup>5</sup> Collusive practices have been regulated by competition law in many countries for some time. Outside of North America, this regulation has largely been of an administrative and civil character.<sup>6</sup> In the last decade though, there has been a global burgeoning of the use of criminal law in dealing with business cartels.<sup>7</sup> The US has led the criminalisation movement where, since the late 1990s, competition authorities have made it their top priority to prosecute and imprison participants in international cartels affecting the US economy.<sup>8</sup> The movement has also had the support of international organisations, such as the Organisation for Economic Co-Operation and Development ('OECD') which has taken a strong anti-cartel stance, exhorting members to ensure that their competition laws effectively deter so-called 'hard core' cartel activity.<sup>9</sup>

An important aspect of the debate surrounding cartel criminalisation concerns the justification of criminal penalties on moral grounds. More specifically, there is the question as to how, at the level of legislative prescription, the offence of cartel conduct may be designed so as to capture explicitly or implicitly the moral reprehensibility generally associated with criminal behaviour. As has been observed in relation to the European experience, the real challenge for jurisdictions new to cartel criminalisation is to establish a concept of 'antitrust delinquency', similar to that which exists in the US.<sup>10</sup> Recognising this challenge, it has been noted in the Australian context by the Trade Practices Act Review Committee ('Dawson Committee') that there is substantial difficulty in 'defining the requisite degree of criminality to justify the imposition of criminal sanctions'.<sup>11</sup>

This difficulty is aggravated by the potential for resistance in Australian competition law circles to the idea that morality may become a relevant consideration in an area of regulation dominated by law and economics.<sup>12</sup> Such resistance has

<sup>5</sup> Christopher Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels' (2006) 14 *Critical Criminology* 181.

<sup>6</sup> David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (2001).

<sup>7</sup> As at 2006, the list of countries providing criminal liability for cartel participation included Austria, Brazil, Canada, Chile, Croatia, France, Germany, Greece, Ireland, Israel, Italy, Japan, Mexico, Norway, the Slovak Republic, South Korea, Switzerland, the United Kingdom and the United States. Many of these countries did not have criminal cartel laws prior to the mid-1990s.

<sup>8</sup> See, eg, Scott D Hammond, 'Charting New Waters in International Cartel Prosecutions' (Paper presented at the 20<sup>th</sup> Annual National Institute on White Collar Crime, San Francisco, 2 March 2006) <<http://www.usdoj.gov/atr/public/speeches/214861.pdf>>.

<sup>9</sup> See *Recommendation of the Council Concerning Effective Action against Hard Core Cartels*, OECD Doc C(98)35/FINAL (1998). 'Hard core' was the term adopted by the OECD to identify those practices that it considered 'the most egregious violations of competition law.' It is a term that has since achieved widespread usage.

<sup>10</sup> Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (2003) 2.

<sup>11</sup> Trade Practices Act Review Committee, Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003) 153. See also the discussion in Louise Castle and Simon Writer, 'More than a Little Wary: Applying the Criminal Law to Competition Regulation in Australia' (2002) 10 *Competition & Consumer Law Journal* 1, 10–14.

<sup>12</sup> See Brent Fisse, 'The Proposed Australian Cartel Offence: The Problematic and Unnecessary Element of Dishonesty' (Legal Studies Research Paper No 06/44, Sydney Law School, 2006); Philip Williams, 'Commentary on Paper by Brent Fisse: "The Proposed Cartel Offence"' (Commentary delivered at the 4<sup>th</sup> Annual University of South Australia Trade Practices Workshop,

been displayed even in the US, where cartels have attracted criminal sanctions for over a century.<sup>13</sup> Generally speaking, in the US, antitrust enforcers, policy-makers and scholars have circumvented the morality of antitrust crimes.<sup>14</sup> This reflects the influence of the Chicago School of economic thought, according to which antitrust analysis is concerned primarily with economic efficiency, and normative concepts such as morality are thereby excluded.<sup>15</sup>

The introduction of morality as a relevant dimension in competition regulation is complicated further by longstanding concerns held by some criminal law theorists over the attachment of criminal consequences to white-collar or regulatory offences.<sup>16</sup> Their concerns stem from the argument that the offending conduct in such contexts is in effect morally neutral or, at least, morally ambiguous.<sup>17</sup> A range of factors is seen as responsible for this perception.<sup>18</sup> In the case of economic activity, however, the moral conundrum has been attributed fundamentally to the conflict between criminalisation and ‘the national ethos’, an ethos that produces ‘the values that the man of business himself holds, as well as the attitude of the public toward him and his activities’.<sup>19</sup> Characterising criminalisation of such conduct as ‘both unjust and counterproductive’, these critics argue that ‘it unfairly brands defendants as criminals, weakens the moral authority of the sanction, and ultimately renders the penalty ineffective.’<sup>20</sup>

However, the charge of regulatory over-criminalisation has not gone unanswered. Two major counter-arguments have emerged. The first is that the over-criminalisation critique fails to recognise or give sufficient weight to the interactive and reciprocal nature of the relationship between the criminal law and public morality. Thus, the criminal law is said to play an important educative and socialising role, informing and shaping society’s perceptions of moral standards — ‘the public learns what is blameworthy in large part from what is punished’.<sup>21</sup>

Barossa Valley, 20 October 2006). See also Justice R S French, ‘Penalties and Remedies under the *Trade Practices Act 1974* (Cth)’ (Paper presented at the Trade Practices and Consumer Law Conference, Sydney, 23 June 2001) 22–4. Cf Justice Ray Finkelstein, ‘Criminalising Hard-Core Cartels: Competition Law Enters the “Moral Universe”’ (Paper presented at the Cracking Cartels: International and Australian Developments Conference, Sydney, 25 November 2004).

<sup>13</sup> *Sherman Act*, c 647, 26 Stat 209 (1890). For the current version: see 15 USC §§ 1–7 (2000 & Supp IV, 2004).

<sup>14</sup> Maurice E Stucke, ‘Morality and Antitrust’ (2006) 4 *Columbia Business Law Review* 443, 448.

<sup>15</sup> Ibid, citing views expressed, for example, by the leading Chicago School advocate, Judge Richard A Posner: see Judge Richard A Posner, ‘Law and Economics Is Moral’ (1990) 24 *Valparaiso University Law Review* 163, 166.

<sup>16</sup> These concerns have been traced back to an influential article by Francis Sayre in 1933, in which he criticised the emergence of so-called ‘public welfare offences’ on the grounds that offenders in such cases are ‘morally innocent and free from fault’: Francis Sayre, ‘Public Welfare Offenses’ (1933) 33 *Columbia Law Review* 55, 79.

<sup>17</sup> See, eg, Herbert L Packer, *The Limits of the Criminal Sanction* (1968) 359.

<sup>18</sup> See Stuart P Green, ‘Moral Ambiguity in White Collar Criminal Law’ (2004) 18 *Notre Dame Journal of Law, Ethics & Public Policy* 501, for a useful discussion of such factors.

<sup>19</sup> Sanford H Kadish, ‘Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations’ (1963) 30 *University of Chicago Law Review* 423, 436.

<sup>20</sup> Stuart P Green, ‘Why It’s a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses’ (1997) 46 *Emory Law Journal* 1533, 1536, summarising the arguments made by critics of so-called ‘regulatory overcriminalisation’.

<sup>21</sup> John Collins Coffee Jr, ‘Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law’ (1991) 71 *Boston University Law Review* 193, 200. See also Henry V Ball and Lawrence M Friedman, ‘The Use of Criminal Sanctions in the En-

Secondly, a significant challenge has been mounted to the notion that white-collar or regulatory offences are morally neutral. In particular, the influential work of legal and moral philosopher Stuart Green provides a tripartite framework for identifying and mapping the moral content of such activity.<sup>22</sup> Under this framework, criminality has three distinct, albeit interrelated, elements: culpability, harmfulness and moral wrongfulness. Green does not assert that any or all of these elements are either sufficient or necessary conditions for criminalisation. However, he does suggest that the absence of any of the three at least might cast doubt on the criminal status of the conduct in question and, in particular, he argues that it is not a proper use of the criminal law to sanction harms that are not also wrongful.<sup>23</sup>

The most elusive and, perhaps for that reason, most contested of these elements — moral wrongfulness — is best understood, Green argues, in terms of everyday moral norms, such as cheating, deception or stealing.<sup>24</sup> His central thesis is that, rather than considering wrongfulness in terms of a violation of another person's rights (the traditional approach),<sup>25</sup> it should be considered in terms of 'a collection of everyday, but nevertheless powerful moral norms'.<sup>26</sup> It is the very everydayness of such norms that, according to Green, helps explain the difficulties encountered in distinguishing between white-collar crime and lawful, even if aggressive, kinds of behaviour.<sup>27</sup> Green draws on these norms as a means of exploring the immorality of conduct that critics of regulatory criminalisation traditionally have regarded as devoid of moral content. His framework is thus of substantial assistance in tackling the moral debate surrounding the criminalisation of cartels and, in particular, in identifying the source(s) of moral wrongfulness in such activity.

forcement of Economic Legislation: A Sociological View' (1965) 17 *Stanford Law Review* 197, 206–7; Tom R Tyler and John M Darley, 'Building a Law-Abiding Society: Taking Public Views about Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law' (2000) 28 *Hofstra Law Review* 707, 714–24.

<sup>22</sup> Stuart P Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (2006).

<sup>23</sup> Ibid 30, 44. For recent reviews of Green's book, including criticisms of his framework: see Mitchell N Berman, 'On the Moral Structure of White-Collar Crime' (Public Law and Legal Theory Research Paper No 118, The University of Texas School of Law, 2007); Peter J Henning, 'The DNA of White Collar Crime' (Wayne State University Law School Legal Studies Research Paper Series No 07-19, 2007). Berman, in particular, is critical of the distinction drawn by Green between culpability and moral wrongfulness and also of the view, at least implicit in Green's thesis, that the law should criminalise only conduct that is wrongful. Whatever their merit, these criticisms do not detract from the value of Green's work in providing a framework for thinking about the criminality of serious cartel conduct and more specifically, the ways in which the elements of the new cartel offence ensure that the criminalised conduct is distinguished from conduct that is the subject of the civil penalty regime only. It is crucial to the integrity and effectiveness of the criminal regime (if not competition policy and doctrine more generally) that these differences are both evident and justifiable.

<sup>24</sup> Green, *Lying, Cheating, and Stealing*, above n 22, 45. Others identified by Green, of lesser relevance in the present context, include coercion, exploitation, disloyalty, promise-breaking and disobedience.

<sup>25</sup> See, eg, Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 34.

<sup>26</sup> Green, *Lying, Cheating, and Stealing*, above n 22, 45.

<sup>27</sup> Green argues that such an approach has an advantage over the more abstract rights-based approach, in that the specified norms are fairly concrete in nature: 'Even people who have never had occasion to read a single page of moral philosophy are capable of making finely grained distinctions about, say, what properly constitutes cheating or stealing': ibid.

This article reviews the Australian proposal for a criminal cartel offence and analyses the extent to which it captures the criminality, as defined by Green's framework, of the conduct to which it will apply. The analysis is timely given the recent high profile action of the Australian Competition and Consumer Commission ('ACCC') against the Visy group of companies and their owner, Richard Pratt, for price-fixing in the corrugated fibreboard packaging industry, resulting in record-level penalties and renewing the push for criminal sanctions for this type of conduct.<sup>28</sup> The relevance of the analysis is based on two significant assumptions. First, it is assumed that criminalisation makes the morality of serious cartel activity a relevant consideration in the design and application of the new law.<sup>29</sup> This follows from the relationship between moral standards in society and criminal law; as Professor John Collins Coffee Jr has observed, there is a 'close linkage between the criminal law and behaviour deemed morally culpable by the general community'.<sup>30</sup> A criminal conviction 'carries with it an ineradicable connotation of moral condemnation'; indeed, it is the 'judgement of community condemnation' that is the defining attribute of the criminal law.<sup>31</sup> Secondly, it is assumed that recognising the moral dimension of the new cartel law will have significant practical effects. In particular, it will shore up public, political and institutional support for the regime, each of which will be necessary

<sup>28</sup> *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd [No 3]* [2007] FCA 1617 (Unreported, Heerey J, 2 November 2007); Graeme Samuel, Chairman of the ACCC, 'Opening Statement' (Visy News Conference, 2 November 2007). The implications of this case for cartel criminalisation, amongst other things, are discussed in Caron Beaton-Wells and Neil Brydges, 'The Cardboard Cartel Case: Was All the Fuss Warranted?' (2008) 36 *Australian Business Law Review* (forthcoming).

<sup>29</sup> There is also a good argument that moral issues arise in antitrust analysis regardless of whether it is regulated by a civil or criminal system: see Stucke, above n 14, 446–7; Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40 *Law & Society Review* 591, 604 fn 14.

<sup>30</sup> Coffee, above n 21, 198. However, it is obviously assumed for these purposes that society is in fact capable of reaching a consensus about the moral status of certain acts and further, that 'society' in this context constitutes a single indivisible body of public opinion. For a discussion of the difficulties in ascertaining social consensus on such matters: see generally Neil Cooper, *The Diversity of Moral Thinking* (1981).

<sup>31</sup> Henry M Hart Jr, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 401, 424; Jerome Hall, *General Principles of Criminal Law* (1947) 157, 182; Andrew Ashworth, *Principles of Criminal Law* (5<sup>th</sup> ed, 2006) 16–17; Mirko Bagaric, 'The "Civilisation of the Criminal Law"' (2001) 25 *Criminal Law Journal* 184. The relevance of morality may also be understood having regard to the goals of a criminal regime and, in particular, the role of retribution as one of the established purposes of criminal sanctions. There are many versions of retributivism, but the core notion is that 'punishment is justified when it is deserved' and that 'criminals deserve punishment because they violate norms established by society': Green, 'Why It's a Crime to Tear the Tag off a Mattress', above n 20, 1552, citing John Cottingham, 'Varieties of Retribution' (1979) 29 *Philosophy Quarterly* 238. See also Joshua Dressler, *Understanding Criminal Law* (4<sup>th</sup> ed, 2006) 11. There are those, however, who defend a consequentialist justification for the criminal law, arguing that criminal sanctions may be invoked out of concern solely for the prevention of social harms, as distinct from the punishment of moral wrongs: see, eg, Barbara Wootton, *Crime and the Criminal Law* (2<sup>nd</sup> ed, 1981). There are also those who take the extreme position that the criminal law has been so overused that it is now devoid of any overarching justification and 'the threshold for making an activity criminal is so low that equally strong argument can be made for criminalizing most activities which involve some degree of harm, risk or non-conformist behaviour': Julie Clarke and Mirko Bagaric, 'The Desirability of Criminal Penalties for Part IV of the *Trade Practices Act*' (2003) 31 *Australian Business Law Review* 192, 199.

for its effective enforcement.<sup>32</sup> It should also boost the deterrence value of the criminal regime by facilitating the internalisation of relevant moral norms in members of the business community,<sup>33</sup> and thereby securing long-term compliance with the law.<sup>34</sup>

Proceeding on the basis of these assumptions and using Green's framework, the article assesses whether the Australian proposal for cartel criminalisation is likely to catch only that conduct which is sufficiently culpable, harmful and wrongful to warrant criminal sanction. In particular, the article examines the way in which the proposed offence, in terms of both its design and the policy for its enforcement, differs in each of these elements from the civil prohibitions that currently (and will continue to) apply to cartel activity in Australia. The approaches taken to such matters in the US and the UK are drawn upon to assist in the analysis. By way of background, however, it is necessary first to set out the terms of the Australian proposal and some explanation of the process and the players involved in its formulation.

## II BACKGROUND

A historical perspective is necessary to appreciate the dramatic change that criminalisation represents for cartel regulation in Australia. Before 1965, restrictive trade practices were rife in this country; indeed, they were widely regarded as 'normal business behaviour'.<sup>35</sup> Under the *Restrictive Trade Practices Act 1965* (Cth), collusive arrangements were prohibited, but only if they had not been registered on an official register of restrictive agreements between competitors. When passed, the current *Trade Practices Act 1974* (Cth) ('TPA') took a different approach. It contains a prohibition on contracts, arrangements or understandings between competitors that have the purpose or effect, or likely

<sup>32</sup> Stucke, above n 14, 510–14. For a detailed examination of the extent to which cartel criminalisation has the support of key stakeholders in Australia: see Caron Beaton-Wells, 'Criminalising Cartels: A Slow Conversion?' (Paper presented at the Fifth Annual University of South Australia Trade Practices Workshop, Rowland Flat, 19 October 2007).

<sup>33</sup> Such an argument has support in the regulation and psychological literature which suggests that in a society in which people act on social values, citizens are motivated to obey the law based on normative considerations, specifically because they think: (1) that the behaviours prohibited by the law are also immoral; and (2) that legal authorities are legitimate and thus entitled to be obeyed: see, eg, Tyler and Darley, above n 21; Soren Winter and Peter May, 'Motivation for Compliance with Environmental Regulations' (2001) 20 *Journal of Policy Analysis and Management* 675; Jon Sutinen and Karen Kuperan, 'A Socio-Economic Theory of Regulatory Compliance' (1999) 26 *International Journal of Social Economics* 174. The argument also finds support in the criminological literature which reports that white-collar criminals are affected not only by rational cost-benefit analyses in deciding whether or not to offend, but also by their own moral beliefs and the threat of informal sanctions by way of disapproval by family and peers: see, eg, Lori A Elis and Sally S Simpson, 'Informal Sanction Threats and Corporate Crime: Additive versus Multiplicative Models' (1995) 32 *Journal of Research in Crime and Delinquency* 399; Raymond Paternoster and Sally Simpson, 'Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime' (1996) 30 *Law & Society Review* 549; see also Kadish, above n 19, 437. For specific reference to the moral impact of criminal antitrust enforcement: see Wouter P J Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 *World Competition* 25, 37.

<sup>34</sup> Parker, above n 29, 592.

<sup>35</sup> Peter H Karmel and Maureen Brunt, *The Structure of the Australian Economy* (1962) 94.

effect, of substantially lessening competition.<sup>36</sup> Certain types of arrangement are banned outright, without testing for such purpose or effect, on the grounds that they are seen as particularly or most predictably anti-competitive in character. These arrangements, characterised by price-fixing or exclusionary/boycott provisions, are said to be prohibited per se.<sup>37</sup>

At the same time, the *TPA* recognises exemptions and defences for some arrangements, as in the case of joint buying and marketing groups (which are exempted from per se illegality)<sup>38</sup> and joint ventures (which may form the basis for a defence to the per se prohibitions).<sup>39</sup> Further, it provides a system by which firms may have their arrangements authorised (and thereby immunised from ACCC proceedings for breach of the substantive prohibition) on the grounds of public benefit.<sup>40</sup> Recent legislation has made this process even easier for small firms wanting to bargain collectively with larger buyers or suppliers — a classic cartel arrangement, but recognised as having sufficient economic, social, and arguably political merit to warrant special treatment.<sup>41</sup> The *TPA* also introduced a penalty regime, albeit one that is explicitly civil in character,<sup>42</sup> allowing the imposition of pecuniary penalties set, since 1993, at maximum levels of \$10 million for corporations and \$500 000 for individuals for each contravention.<sup>43</sup> As a result of recent amendments, these levels have been increased for corporations to the higher of \$10 million or three times the benefit derived from the contravention or, if the benefit is unascertainable, 10 per cent of the annual turnover of the corporation.<sup>44</sup>

In 2001, the then Chairman of the ACCC, Allan Fels, publicly called for the first time for the introduction of criminal sanctions for hard core collusive activity in Australia.<sup>45</sup> The primary rationale offered for criminalisation was the need for greater deterrence. In particular, it was argued that in the current era of globalised and deregulated trade, the Australian economy is especially vulner-

<sup>36</sup> *TPA* s 45(2).

<sup>37</sup> See s 45A of the *TPA* for the definition of a price-fixing provision and s 4D for the definition of an exclusionary provision. The definition in s 45A would also incorporate most forms of market division, output restriction and bid-rigging. The definition in s 4D goes beyond traditional boycott scenarios and would capture some types of cartel arrangement, such as market division.

<sup>38</sup> *TPA* s 45A(4).

<sup>39</sup> *TPA* ss 76C–D.

<sup>40</sup> *TPA* s 88.

<sup>41</sup> This procedure was introduced recently by the *Trade Practices Legislation Amendment Act [No 1] 2006* (Cth) sch 3, amending the *TPA*, which took effect on 1 January 2007.

<sup>42</sup> *TPA* s 78. In the first attempt at competition regulation in this country, the *Australian Industries Preservation Act 1906* (Cth), there were in fact criminal penalties that attached to the prohibitions on restraints of trade and monopolisation (at ss 4–9), reflecting developments in the US and the provisions of the *Sherman Act*, c 647, 26 Stat 209 (1890). Criminal penalties were removed from the subsequent *Trade Practices Act 1965* (Cth) which, being modelled predominantly on the English rather than the US approach to antitrust, adopted an administrative rather than a judicial method of enforcement. For an explanation for these variations in approach to trade practices penalties: see Caron Beaton-Wells, ‘The Politics of Cartel Criminalisation: A Pessimistic View from Australia’ (2008) *European Competition Law Review* (forthcoming).

<sup>43</sup> *TPA* ss 76(1A)–(1B).

<sup>44</sup> Trade Practices Legislation Amendment Bill [No 1] 2006 (Cth).

<sup>45</sup> Allan Fels, ‘Regulating in a High-Tech Marketplace’ (Paper presented at the Australian Law Reform Commission, Penalties: Policy, Principles and Practice in Government Regulation — Conference, Sydney, 9 June 2001) 3–6.

able to the operation of international cartels. Australia, it was said, lags behind its major trading partners in taking tough action against practices that inflict significant harm on competition and consumer welfare. Notably, in addition to justification on the grounds of harmfulness and the need for enhanced deterrence, Fels asserted that hard core collusion ought to be seen as ‘morally reprehensible’, as tantamount to theft or fraud and as little different in this regard from other white-collar crimes.<sup>46</sup> Viewed in this light, there was a case for at least considering punishment as another legitimate object in penalising colluders (bearing in mind the judicial emphasis to date on deterrence as the primary, if not sole, object of penalisation).<sup>47</sup> These were not, Fels argued, ‘victimless crimes’, but rather should be seen as ‘harmful and malevolent acts’ committed by ‘serious offenders prepared to inflict massive damage on consumers and markets for their own gain’.<sup>48</sup>

The ACCC’s call for criminalisation was formalised in its submission to the Dawson Committee, a committee charged with the task of reviewing the provisions of the *TPA* in 2002.<sup>49</sup> In its January 2003 report, the Committee agreed that the current civil penalty regime was an insufficient deterrent to the business community. It recommended that criminal sanctions be introduced, subject to the resolution of definitional, procedural and leniency-related issues.<sup>50</sup> The Committee made no comment on the question of how cartel activity might be viewed from a moral standpoint, despite acknowledging the difficulties in discriminating, in terms of offence design, between conduct that is suitable for a civil regime of regulation and that which ought to be singled out for criminal penalisation.<sup>51</sup>

A government working party on penalties for cartel behaviour was convened in October 2003 for the purposes of resolving these and other issues. The report of that working party has not been released and a request for access to it under the *Freedom of Information Act 1982* (Cth) has been refused.<sup>52</sup> However, on 2 February 2005, the then Treasurer, Peter Costello, announced in a press release that criminal sanctions for ‘serious cartel behaviour’ would be introduced.<sup>53</sup> The ‘cartel offence’ proposed by the Treasurer

will 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

<sup>46</sup> Ibid.

<sup>47</sup> Ibid. For a discussion of the judicial approach to penalisation of breaches of the competition provisions of the *TPA*: see Caron Beaton-Wells, ‘Recent Corporate Penalty Assessments under the *Trade Practices Act* and the Rise of General Deterrence’ (2006) 14 *Competition & Consumer Law Journal* 65.

<sup>48</sup> Fels, above n 45.

<sup>49</sup> ACCC, *Submission to the Trade Practices Act Review* (2002).

<sup>50</sup> Trade Practices Act Review Committee, above n 11, 161–2.

<sup>51</sup> Ibid 153.

<sup>52</sup> Brent Fisse, ‘The Cartel Offence: Dishonesty?’ (2007) 35 *Australian Business Law Review* 235, 236 fn 4. Documents relevant to the freedom of information request are available at: Brent Fisse Lawyers <<http://www.brentfisse.com>>. The Administrative Appeals Tribunal will hear the application for review of the Treasury’s decision to refuse access to the report on 19 February 2008.

<sup>53</sup> Costello, above n 1.

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>54</sup>

The proposal indicated that the maximum penalties for individuals for a cartel offence will be a term of five years' imprisonment and a fine of \$220 000. For corporations, reflecting the new civil provisions, the fine will be the greater of \$10 million or three times the value of the benefit from the cartel or where that value cannot be ascertained, 10 per cent of annual group turnover. The Treasury papers for the 2006 Commonwealth Budget indicated that the legislation would be introduced to Parliament in the winter sittings of that year.<sup>55</sup> However, the Bill was not introduced. In August 2007, the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2007 (Cth) and Federal Court Amendment (Criminal Jurisdiction) Bill 2007 (Cth) were listed on the government's website as legislation proposed to be introduced in the spring sittings of Parliament. However, subsequently the calling of the federal election intervened. As indicated earlier, despite the change in government, it is fairly clear that a Bill criminalising serious cartel conduct will still be introduced and the only questions that remain are when this will happen and what form the Bill ultimately will take. An exposure draft of the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth), together with a discussion paper and draft memorandum of understanding ('MOU') between the ACCC and Director of Public Prosecutions ('DPP') was released on 11 January 2008, calling for submissions by 29 February 2008.<sup>56</sup> These documents reflect largely the proposals set out in the Treasurer's 2005 press release.<sup>57</sup>

### III CULPABILITY

'Culpability' is the term used by Green to refer to 'the moral value attributed to a defendant's state of mind during the commission of a crime'.<sup>58</sup> In considering the elements of any criminal offence, the relevant wrongful act must be accompanied by a culpable mental state, generally referred to as mens rea. However, the broader concept of culpability also takes into account possible excuses or defences available to defendants who are otherwise found to have possessed the requisite state of mind.<sup>59</sup> For the purposes of his moral framework, Green explains that '[c]ulpability reflects the degree to which an individual offender is blameworthy or responsible or can be held accountable. It characterizes the actor, rather than the act and its consequences'.<sup>60</sup>

<sup>54</sup> Ibid.

<sup>55</sup> See Australian Government, *Budget Paper No 2: Budget Measures 2006–07* (2006) pt 2.

<sup>56</sup> These documents are available at: The Treasury <<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1330>>.

<sup>57</sup> Given that this article was finalised for publication many months prior to the release of these documents, the analysis in this article is based on the 2005 proposals.

<sup>58</sup> Green, 'Why It's a Crime to Tear the Tag off a Mattress', above n 20, 1547.

<sup>59</sup> Green, *Lying, Cheating, and Stealing*, above n 22, 30–1. For the purposes of this article, the broader concept of culpability has been employed, as reference is made to the possible defences and exceptions to the new cartel offence.

<sup>60</sup> Green, 'Why It's a Crime to Tear the Tag off a Mattress', above n 20, 1547–8. It should be noted in this context that Green does not deal at any length with the particular challenges involved in

He points out that lowering the standard of culpability has become commonplace in the regulatory arena.<sup>61</sup> It has taken the form of either the elimination of a mens rea requirement altogether (as in the case of absolute or strict liability offences) or resort to lesser mens rea requirements than the traditional criminal intent, purpose or knowledge (as in offences based on recklessness or negligence).<sup>62</sup> This diminution in the level of culpability required for the imposition of criminal sanctions is viewed by many commentators as ‘inconsistent with the moral underpinnings of the criminal law’.<sup>63</sup> Offences lacking in mens rea or sufficient mens rea are said not to be truly criminal because they do not involve the culpability or ‘subjective blameworthiness’ traditionally associated with the criminal system of justice.<sup>64</sup>

Under the civil regime governing competition regulation in Australia, the mental state of those involved in anti-competitive conduct generally has been seen as irrelevant or near-irrelevant to its legality. Consistent with the economic policy underlying the law, the focus has been on the effects of the conduct and, in particular, its effects on competition.<sup>65</sup> Thus, the test that is central to most of the statutory prohibitions is whether the conduct ‘has or is likely to have the effect of substantially lessening competition’.<sup>66</sup> In the case of agreements between competitors, the civil prohibition applies also to provisions that have the ‘purpose ... of substantially lessening competition’.<sup>67</sup> To the extent that this may be likened to a culpability requirement (bearing in mind that it is an alternative to establishing the requisite anti-competitive effect), it is not all that difficult to satisfy. This is because, under the *TPA*, the relevant purpose need not have been the sole or even the primary purpose of the provision. It is sufficient if it was a ‘substantial’<sup>68</sup> purpose and there is thus room for the respondent to argue that the impugned purpose was insubstantial and that the ‘real’ reason for the arrange-

establishing the culpability of corporate, as distinct from individual, actors. It is unclear at this stage whether the proposed cartel offence will be subject to the vicarious liability provisions in *TPA* s 84 or the provisions of the *Criminal Code Act 1995* (Cth) on corporate criminal liability: see Brent Fisse, ‘The Australian Cartel Criminalisation Proposals: An Overview and Critique’ (2007) 4(1) *Competition Law Review* 51, 60–4.

<sup>61</sup> Green, ‘Why It’s a Crime to Tear the Tag off a Mattress’, above n 20, 1548. Cf Richard G Singer, ‘The Resurgence of Mens Rea III — The Rise and Fall of Strict Criminal Liability’ (1989) 30 *Boston College Law Review* 337, 338–9.

<sup>62</sup> See generally Julian Greenspun, ‘Criminal Intent Requirements and Defenses in Regulatory Prosecutions’ (1982) 18 *Criminal Law Bulletin* 293. See also the references in Green, ‘Why It’s a Crime to Tear the Tag off a Mattress’, above n 20, 1558 fn 74.

<sup>63</sup> Green, ‘Why It’s a Crime to Tear the Tag off a Mattress’, above n 20, 1548 fn 30. Cf John L Diamond, ‘The Myth of Morality and Fault in Criminal Law Doctrine’ (1996) 34 *American Criminal Law Review* 111.

<sup>64</sup> Sayre, above n 16, 56 fn 5, 69.

<sup>65</sup> Other non-economic effects are taken into account, albeit only at the stage of considering whether or not the ACCC should authorise the conduct in question so as to effectively immunise it from breach of the relevant prohibition: see above n 40 and accompanying text.

<sup>66</sup> See *TPA* ss 45 (horizontal restraints), 47 (non-price vertical restraints/exclusive dealing), 50 (mergers and acquisitions).

<sup>67</sup> *TPA* s 45(2) (emphasis added).

<sup>68</sup> *TPA* s 4F(1).

ment was a benign or even pro-competitive one.<sup>69</sup> It is also relevant to note that, although the courts have approached the concept of purpose in this context as referable to the subjective motives of those involved,<sup>70</sup> they have also displayed a readiness to infer the purpose from conduct or its effects,<sup>71</sup> thereby removing the need to prove purpose directly.<sup>72</sup>

Notwithstanding the preoccupation of the civil regime with objective outcomes, there is some answer to an alleged contravention of the statutory prohibitions that, on its face at least, is more concerned with the culpability of the individuals involved than with the impact of their conduct. Section 85(6) of the *TPA* allows the court to relieve a person wholly or partly from a penalty or damages where he or she is found to have ‘acted honestly and reasonably and, having regard to all the circumstances of the case’. To date there has been only one recorded instance where the section has been invoked in response to an alleged breach of the competition provisions of the *TPA*.<sup>73</sup>

In terms of its physical elements, the new criminal offence is proposed to apply to a subset of the conduct that is presently prohibited *per se* under the civil regime, namely to those contracts, arrangements or understandings that contain a provision to fix prices, restrict output, divide markets or rig bids ('cartel provision').<sup>74</sup> Furthermore, so as to ensure consistency between the civil and criminal regimes, it is proposed to amend the civil provisions to delineate separate categories of cartel activity along the lines proposed for the criminal offence.<sup>75</sup> Thus, under the criminal offence, there will be two physical elements. First, the corporation must be shown to have made or given effect to a contract, arrangement or understanding and secondly, the contract, arrangement or understanding must be shown to contain a cartel provision.

Under the *Criminal Code Act 1995* (Cth), an offence comprises physical and mental (or fault) elements.<sup>76</sup> The first physical element under the proposed cartel

<sup>69</sup> See, eg, the debate over the distinction between an immediate purpose and an ultimate purpose, as reflected in: *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563; *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90.

<sup>70</sup> *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd [No 1]* (1990) 27 FCR 460. Cf *Australian Competition and Consumer Commission v Pauls Ltd* (2002) ATPR ¶41-911; *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 584–7 (Gummow J).

<sup>71</sup> See, eg, *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109. Indeed, it has been argued that ‘purpose’ should be given primacy in competition law because it ‘provides one of the best indications of the likely effect’ of an arrangement between competitors: Donald Robertson, ‘The Primacy of “Purpose” in Competition Law — Part 1’ (2001) 9 *Competition & Consumer Law Journal* 1.

<sup>72</sup> This approach is authorised specifically in the context of having to prove a proscribed purpose in order to establish a misuse of power in a market under s 46(1) of the *TPA*: at s 46(7).

<sup>73</sup> See *Australian Competition and Consumer Commission v Anglo Estates Pty Ltd* (2005) ATPR ¶42-044, where French J was prepared to exercise the power in dispensing with the penalty against an individual respondent who was found to have acted honestly in reliance on erroneous legal advice which caused him to believe that his conduct would not contravene the *TPA*, and who was of advanced age, suffering a serious cancer and of limited income.

<sup>74</sup> This list reflects the OECD definition of ‘hard core’ collusive practices: see *Recommendation of the Council*, above n 9.

<sup>75</sup> See Costello, above n 1.

<sup>76</sup> See *Criminal Code Act 1995* (Cth) s 3.1(1).

offence would be characterised under the Act as ‘conduct’.<sup>77</sup> So characterised, the default mental or fault element (in the absence of a different mental element specified in the legislation) will be intention.<sup>78</sup> According to the proposal, there will be an additional requirement (of an intention to dishonestly obtain a benefit);<sup>79</sup> however, that requirement is of greater concern in connection with the second and third limbs of Green’s framework and hence is discussed in the Parts dealing with those limbs below.<sup>80</sup>

Intention is seen as the cornerstone of the fault elements in the criminal law, reflecting the paradigm of individual choice and control that is necessary for criminal responsibility.<sup>81</sup> Importantly for present purposes, it is distinguishable from the concept of purpose under the civil prohibition; whereas ‘purpose’ in this context is viewed as the end aimed at,<sup>82</sup> ‘intention’ has a much broader scope, encompassing both the end and the means by which it is to be reached, as well as knowledge of all the relevant circumstances.<sup>83</sup> Criminal intent will also be more difficult to prove than anti-competitive purpose. Not only will a higher standard of proof (beyond a reasonable doubt) apply, but the criminal law has a stricter approach to the use of circumstantial evidence as a means of proving mens rea. In particular, it is impermissible to presume that an accused intended the natural and probable consequences of his or her acts.<sup>84</sup> Further, in inferring intention from the relevant conduct and surrounding circumstances, the jury must be satisfied that the evidence bears out no other reasonable explanation.<sup>85</sup>

It remains unclear, however, as to whether for the purposes of the proposed offence the prosecution will need to prove a common intention, that is an intention shared by all of the parties to the offending arrangement as distinct from an intention shared by only two parties. The former is consistent with the

<sup>77</sup> See *Criminal Code Act 1995* (Cth) s 4.1(1)(a). ‘Conduct’ means ‘an act, an omission to perform an act or a state of affairs’: at s 4.1(2).

<sup>78</sup> See *Criminal Code Act 1995* (Cth) s 5.6(1).

<sup>79</sup> See Costello, above n 1.

<sup>80</sup> It is interesting to note, however, that the dishonesty requirement makes the proposed cartel offence similar to the criminal offence of conspiracy to defraud under s 135.4 of the *Criminal Code Act 1995* (Cth) sch. (‘*Criminal Code*’). The Serious Fraud Office in the UK recently launched a major prosecution of a price-fixing cartel for conspiracy to defraud (the cartel offence not having been enacted at the time that the relevant conduct took place), leading to some debate as to whether a wholly new offence is required to deal with such arrangements: see Mark Furse and Susan Nash, ‘A Rose by Any Other Name’ (2006) 156 *New Law Journal* 780. Cf Sir Jeremy Lever and John Pike, ‘Cartel Agreements, Criminal Conspiracy and the Statutory “Cartel Offence” — Part 1’ (2005) 26 *European Competition Law Review* 90; Sir Jeremy Lever and John Pike, ‘Cartel Agreements, Criminal Conspiracy and the Statutory “Cartel Offence” — Part 2’ (2005) 26 *European Competition Law Review* 164, 165–8, in which the differences between the common law conspiracy to defraud offence and the statutory cartel offence are identified. Furthermore, of relevance to this debate is *Norris v United States* [2007] 2 All ER 29, in which it was held that Ian Norris could be extradited to face cartel charges in the US given that there was an equivalent offence at the same time in the UK, namely the common law conspiracy to defraud offence.

<sup>81</sup> See generally H L A Hart, *Punishment and Responsibility* (1968).

<sup>82</sup> See Robertson, above n 71, and the references cited therein. Robertson also distinguishes ‘purpose’ in the competition law context from motive and knowledge of consequences: at 18–21.

<sup>83</sup> Under the *Criminal Code Act 1995* (Cth) s 5.2(1): ‘A person has intention with respect to conduct if he or she means to engage in that conduct’.

<sup>84</sup> *Parker v The Queen* (1963) 111 CLR 610, 632–3 (Dixon CJ).

<sup>85</sup> *Martin v Osborne* (1936) 55 CLR 367, 375 (Dixon J).

approach taken to the offence of conspiracy at common law<sup>86</sup> and would appear desirable from a moral perspective (the alternative being that a defendant may be implicated notwithstanding having lacked the criminal intent of the cartel co-conspirators).<sup>87</sup>

The second physical element (relating to the offending provision contained in the contract, arrangement or understanding) would be characterised under the Act as 'a result of conduct'.<sup>88</sup> The default mental element for this would be recklessness, defined as a situation in which (1) the accused is aware of a substantial risk that the result will occur; and (2) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.<sup>89</sup> Although not as onerous a standard as intention, the requirement to prove recklessness on the part of the defendant in relation to the cartel provision will distinguish the criminal offence from its civil counterpart. Under the latter, it presumably will be sufficient to show (and on a lesser standard of proof) the existence of the provision as an objective fact, irrespective of the respondent's state of mind.

As far as exemptions, defences and authorisation are concerned, it is proposed that conduct that currently escapes the civil prohibition on any of these grounds will also fall outside the scope of the cartel offence.<sup>90</sup> This is to be contrasted with the UK approach under the *Enterprise Act 2002* (UK) c 40, where the requirement of dishonesty is seen as the mechanism by which liability may be avoided. The flaws in this approach have been canvassed at length elsewhere.<sup>91</sup> However, there are also questions as to whether, from a culpability perspective, any existing Australian defence ought to be modified to reflect the criminal context or whether this context necessitates the introduction of new defences (incorporating, for example, the defences available under Chapter 2 of the *Criminal Code Act 1995* (Cth)). In relation to the former, the existing joint venture defence to the civil prohibition cannot be made out unless the defendant can establish that there was no objective likelihood of substantially lessening competition. Under the criminal prohibition, however, it has been suggested that it should be 'sufficient for the defendant to establish that there was no awareness of the likelihood of substantially lessening competition in a market'.<sup>92</sup> This adjustment would reflect 'an attempt to align the joint venture defence with the general principle that the mental element for criminal liability should be inten-

<sup>86</sup> See *Gerakiteys v The Queen* (1984) 153 CLR 317. Cf the approach under *Criminal Code* s 11.5.

<sup>87</sup> Under the civil regime, in relation to the purpose of exclusionary provisions under *TPA* s 4D, there is conflicting authority as to whether commonality of purpose is required: see *Carlton & United Breweries (NSW) Pty Ltd v Bond Brewing New South Wales Ltd* (1987) 16 FCR 351, 356 (Wilcox J); cf *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd [No 1]* (1990) 27 FCR 460, 477 (Lockhart, Gummow and von Doussa JJ). See also *Seven Network Ltd v News Ltd* (2007) ATPR (Digest) ¶46-274, 54 677 (Sackville J), which offers a further permutation.

<sup>88</sup> See *Criminal Code Act 1995* (Cth) s 4.1(b).

<sup>89</sup> See *Criminal Code Act 1995* (Cth) s 5.6(1).

<sup>90</sup> Costello, above n 1.

<sup>91</sup> See Fisse, 'The Australian Cartel Criminalisation Proposals: An Overview and Critique', above n 60, 65–6.

<sup>92</sup> See Fisse, 'The Cartel Offence: Dishonesty?', above n 52, 272–3.

tion, knowledge or recklessness where the offence carries the possibility of a jail term.<sup>93</sup>

In relation to the possibility of new defences, several options have emerged, including a defence of public benefit,<sup>94</sup> a defence of mistake of law based on reasonable reliance on legal or economic advice,<sup>95</sup> and a defence of economic duress or necessity.<sup>96</sup> As set out previously by Brent Fisse, a leading Australian commentator, each of these possibilities has its merits and demerits,<sup>97</sup> the discussion of which is not replicated here. However, if such defences are contemplated for the purposes of the criminal regime then it would seem important, as a matter of principle, to consider whether they should be extended to the civil prohibition.

It has not been suggested that a discretionary power equivalent or similar to that conferred by s 85(6) of the *TPA* will be available to the court in dealing with defendants charged under the offence. However, under the current proposal, a defendant found to have acted honestly would not be guilty in any event (given the dishonesty requirement currently proposed as an element of the mens rea). That is not to say that there will or should not be other factors taken into account when considering a defendant's culpability, both at the stage of determining whether to prosecute and, as already occurs in determining civil penalties, at the stage of sentencing. As indicated below, it has been proposed that a defendant's recidivism will be a factor that the DPP takes into account in deciding whether to bring charges.<sup>98</sup> However, presumably there will be additional factors that are considered for this purpose.<sup>99</sup> In the US, one of the factors cited as relevant to

<sup>93</sup> Ibid. Note, however, the risk of competitors creating 'sham' joint ventures to escape criminal liability: see Fisse, 'The Australian Cartel Criminalisation Proposals: An Overview and Critique', above n 60, 66.

<sup>94</sup> Submission to the Trade Practices Act Review Committee, 24 July 2002, Submission No 138 (Business Law Committee, Law Council of Australia).

<sup>95</sup> Fisse, 'The Cartel Offence: Dishonesty?', above n 52, 272–3, indicating that this is a version of a defence suggested by the ACCC to the Dawson Committee — the ACCC having suggested that 'cartel behaviour should only be a criminal offence where the accused knew that the conduct was in breach of, or was likely to be in breach of, the law': Trade Practices Act Review Committee, above n 11, 156.

<sup>96</sup> Fisse, 'The Cartel Offence: Dishonesty?', above n 52, 272–3.

<sup>97</sup> See ibid.

<sup>98</sup> This has been provided for in the proposed public MOU between the ACCC and the DPP and is discussed in Part IV below. See Costello, above n 1.

<sup>99</sup> In an attachment to a subsequent submission to the Dawson Committee by the ACCC, entitled 'Outline of Proposed Memorandum of Understanding between the Director of Public Prosecutions and the Australian Competition and Consumer Commission', some such additional criteria were identified as follows:

Is there evidence that those involved thought the conduct was dishonest? Do the participants have a history of involvement in cartels? Is there clear evidence that the defendants were not aware of or did not appreciate the consequences of their conduct? Is there evidence that the participants knew that their conduct was illegal but decided to proceed to engage in that conduct? Is there any evidence of coercion?

These criteria were not mentioned in the Treasurer's press release and the status of this document is unclear. It was released to Brent Fisse in response to a request for access under the *Freedom of Information Act 1982* (Cth): see Brent Fisse, *ACCC Supplementary Submissions to Dawson Committee Released by the ACCC after FOI Application by Brent Fisse and Lexpert Publications Pty Ltd* (9 October 2007) Brent Fisse Lawyers <<http://www.brentfisse.com/images/AcccsupplementarysubmissionsDawsonCommittee2002.pdf>>. The additional criteria are also not included in the draft MOU that was released on 11 January 2008.

deciding whether to proceed with criminal charges is ‘the degree of culpability of conspirators.’<sup>100</sup> No doubt, this would involve an assessment of the nature and extent of participation in the cartel. For example, in the case of a corporate defendant, whether it played the role of ringleader, passive follower or unwilling coerced member; in the case of an individual, his or her level of seniority and the extent to which he or she was following orders; and, in the case of both, the duration of their involvement. Furthermore, the US Department of Justice has a policy not to prosecute in cases where ‘confusion reasonably may have been caused by past prosecutorial decisions’ or ‘there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.’<sup>101</sup>

#### IV HARMFULNESS

Green uses his second basic element of moral content, harmfulness, to refer to ‘the degree to which a criminal act causes (or risks causing) harm.’<sup>102</sup> He adopts a definition of ‘harm’ as ‘some relatively lasting or significant setback to a person’s interests.’<sup>103</sup> The concept of ‘interest’, for this purpose, is viewed broadly as ‘something in which a person has a stake.’<sup>104</sup> However, he also makes it clear that the concept of criminal harm extends not only to injury to an individual’s interests but also to the collective interests of society (hence accommodating the harms to competition and consumer welfare flowing from business cartels).<sup>105</sup> The element of harmfulness ‘refers to the act and its consequences, rather than the actor’.<sup>106</sup> It is distinguishable from the elements of culpability and wrongfulness in that the conduct that causes the harm may not have been intentional or even reckless and may also not be seen as wrongful.<sup>107</sup>

Green points out that harmfulness plays a distinctive role in white-collar crime in that, for example, harms and victims are often difficult to identify and quantify. The offence may sometimes involve the mere risk of harm, and the conduct in question may be associated with legitimate conduct that may mitigate its harmfulness or at least its perceived harmfulness.<sup>108</sup> Each of these observations holds true in the context of business collusion. In particular, the difficulties in measuring the harms caused by cartel activity are well-recognised.<sup>109</sup> It is

<sup>100</sup> See Antitrust Division, Department of Justice, United States, *Antitrust Division Manual* (3<sup>rd</sup> ed, 1998) ch III pt C(5) <[http://www.usdoj.gov/atr/foia/divisionmanual/table\\_of\\_contents.htm](http://www.usdoj.gov/atr/foia/divisionmanual/table_of_contents.htm)>.

<sup>101</sup> Ibid. For an explanation of the origins of this approach: see Donald I Baker, ‘To Indict or Not to Indict: Prosecutorial Discretion in *Sherman Act* Enforcement’ (1978) 63 *Cornell Law Review* 405.

<sup>102</sup> Green, *Lying, Cheating, and Stealing*, above n 22, 34.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Green, ‘Why It’s a Crime to Tear the Tag off a Mattress’, above n 20, 1549–50.

<sup>106</sup> Ibid 1549.

<sup>107</sup> Ibid.

<sup>108</sup> Green, *Lying, Cheating, and Stealing*, above n 22, 35–8.

<sup>109</sup> As a result, courts have tended to relieve parties of the need to produce evidence measuring cartel harms for the purposes of setting appropriate penalties and have often relied on the value of the commerce affected by the conduct as a proxy for the losses associated with anti-competitive conduct: see, eg, *Australian Competition and Consumer Commission v SIP*

these harms, nevertheless, that are relied on as the principal justification for the introduction of criminal sanctions as a means of deterring cartel activity.<sup>110</sup> Such activity is characterised as the worst category of anti-competitive conduct in terms of its harmfulness. It is said to raise prices above competitive levels, reduce output and remove incentives to innovate, whilst offering no legitimate economic or social benefits to compensate for the losses generated as a consequence.<sup>111</sup> While conceding that precise quantification is difficult, the OECD has concluded that the harm caused by cartels on a worldwide basis 'conservatively exceeds the equivalent of billions of US dollars per year'.<sup>112</sup> In the US, the Sentencing Commission bases its calculations of appropriate fines on the assumption that cartels typically raise prices by 10 per cent.<sup>113</sup> However, there is literature to suggest that this estimate is too low.<sup>114</sup>

As pointed out above, the current civil regime governing competition in Australia is multi-layered, reflecting the complexity involved in distinguishing between conduct that, from an economic or competition perspective, is regarded as unacceptable and conduct that is regarded for this purpose as acceptable. Against this background, it is not surprising that there has been concern about how to ensure that only those cartel arrangements that may be considered the most serious in terms of their likely harms are subject to the criminal provisions. The ACCC's initial approach to this was problematic. In its submission to the Dawson Committee, the ACCC argued that criminal sanctions in Australia should apply only to larger corporations while small businesses, including in the rural and professional sectors and unions, should not be criminally liable for collusive conduct.<sup>115</sup> It rationalised this approach entirely in terms of the relative

*Australia Pty Ltd* (2003) ¶ATPR 41-937, 47 071 (Goldberg J); *Australian Competition and Consumer Commission v Tyco Australia Pty Ltd* (2000) ¶ATPR 41-740, 40 573 (Drummond J); *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd [No 2]* (2002) 190 ALR 169, 178–9 (Finkelstein J). For discussion of the issues involved in proving the damage caused by cartel activity: see David K Round, 'Consumer Protection: At the Mercy of the Market for Damages' (2003) 10 *Competition & Consumer Law Journal* 231.

<sup>110</sup> See Costello, above n 1. See also Department of Trade and Industry, United Kingdom, *White Paper, Productivity and Enterprise: A World Class Competition Regime*, Cm 5233 (2001).

<sup>111</sup> In economic terms, the damage caused by cartels is generally explained in terms of their impact on efficiencies. For an explanation of this: see Competition Committee, Directorate for Financial, Fiscal and Enterprise Affairs, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws*, 2, OECD Doc DAF/COMP(2002)7 (2002) <<http://www.oecd.org/dataoecd/16/20/2081831.pdf>>.

<sup>112</sup> Ibid.

<sup>113</sup> Mark A Cohen and David T Scheffman, 'The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?' (1989) 27 *American Criminal Law Review* 331, 335.

<sup>114</sup> John M Connor and Robert H Lande, 'How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines' (2005) 80 *Tulane Law Review* 513, 559 (citations omitted): 'Our primary finding is that the median cartel overcharge for all types of cartels over all time periods has been 25%: 17–19% for domestic cartels and 30–33% for international cartels.' See also Competition Committee, above n 111, finding from a more limited survey of 14 cases a median mark-up of between 15 and 20 per cent: at 9.

<sup>115</sup> The ACCC proposed that the mechanism used to limit the cartel offence to large corporations would involve the application of size criteria. Thus, it was submitted that only companies satisfying two of the following criteria would be liable for criminal penalties: (1) gross revenue in excess of \$100 million; (2) gross asset value in excess of \$30 million; or (3) more than 1000 employees: see ACCC, above n 49, 41.

harmfulness of large corporate collusion, particularly as it arises in the context of international cartels.<sup>116</sup>

The singling out of large corporations for the purposes of criminal liability met with such opposition<sup>117</sup> that the ACCC abandoned the idea, accepting in a subsequent submission that 'a crime for one should be a crime for all'.<sup>118</sup> However, that left unresolved the question of how to identify the most damaging cartels for the purposes of criminalisation. The Treasurer's press release indicated that it would be a matter dealt with by way of constraint on investigatory and prosecutorial discretion, guided by a publicly available MOU between the ACCC and DPP.<sup>119</sup> The MOU would set out factors that the ACCC must consider before referring a matter to the DPP for possible criminal prosecution and factors that the DPP must consider before deciding to prosecute. Those factors, in both cases, would include:

- 1 the impact of the conduct on the market;
- 2 the scale of detriment, loss or damage to consumers or the public; and
- 3 whether one or more of the participants had previously been found to have engaged in cartel conduct, or had admitted to doing so.<sup>120</sup>

In addition, it is proposed that thresholds will be included in the MOU to provide further guidance. Specifically, the ACCC would need to consider whether the combined value for all cartel participants of the specific line of commerce affected by the cartel exceeds \$1 million within a 12-month period.<sup>121</sup> This aspect of the proposal bears some resemblance to the approach taken in the UK, where one of the questions asked by the Serious Fraud Office in deciding whether or not to prosecute under the cartel offence is whether 'the value of the alleged fraud exceed[s] £1 million.'<sup>122</sup> However, the importance of this criterion

<sup>116</sup> Ibid.

<sup>117</sup> See, eg, Submission to the Trade Practices Act Review Committee, 9 July 2002, Submission No 71 (Business Council of Australia); Submission to the Trade Practices Act Review Committee, 15 July 2002, Submission No 104 (Australian Chamber of Commerce and Industry); Business Law Committee, above n 94.

<sup>118</sup> Trade Practices Act Review Committee, above n 11, 149. This subsequent submission was not made public at the time but has since been released in response to a request under the *Freedom of Information Act 1982* (Cth) by Brent Fisse: see Brent Fisse, *ACCC Supplementary Submissions to Dawson Committee*, above n 99. Notably, while conceding the appropriateness of universal criminalisation, the ACCC nevertheless sought differential treatment of corporations depending on their size, observing:

If a cartel involving small companies had only a limited impact on the economy, it would be expected that a judge would exercise his/her discretion to impose penalties at the lower end of the possible range. In practice, this may rule out imprisonment for those involved in small businesses.

<sup>119</sup> See Costello, above n 1.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid: 'For bid rigging cases, the value of the successful bid or series of bids would need to exceed \$1 million within a 12-month period'.

<sup>122</sup> Memorandum of Understanding between the Office of Fair Trading and the Director of the Serious Fraud Office, October 2003, OFT 547, 5. The other listed criteria are:

- Is the case likely to give rise to national publicity and widespread public concern?
- Does the case require highly specialist knowledge of, for example, stock exchange procedures or regulated markets?

is downplayed somewhat, described as ‘simply an objective and recognisable signpost of seriousness and likely public concern rather than a main indicator of suitability.’<sup>123</sup> In the US, prosecutorial discretion is less structured. There the decision to launch a criminal investigation is said to take account of three questions, one of which is whether the matter is ‘significant’.<sup>124</sup> The assessment of significance is described as a ‘flexible, matter-by-matter analysis’, based on various factors, specifically:

- the volume of commerce affected;
- the geographic area impacted;
- the potential for expansion of the investigation to other areas and industries;
- the deterrent impact of the investigation and prosecution;
- the degree of culpability of conspirators; and
- whether the scheme involved a fraud on the federal government.<sup>125</sup>

The harm threshold contained in the Australian proposal raises two issues. The first is whether, as currently framed, it is likely to be effective in restricting prosecutions to the most seriously harmful cartels. It has been pointed out in this regard that the fact that the value of commerce affected by the cartel conduct exceeds \$1 million does not mean in itself that the impact on competition has been serious. Thus, the threshold, being based on a fixed monetary value, has the potential to be both under-inclusive and over-inclusive, depending on the size of the market in which the cartel members operate. To address the latter concern, it has been recommended that the threshold be framed as a minimum percentage (say 20 per cent or more) of the combined value of all sales by all competitors who competed over the relevant period in the specific line of commerce in the relevant geographic market affected by the cartel.<sup>126</sup>

The second issue is whether a harm threshold should operate as a restraint on prosecutorial discretion or as a jurisdictional element of the offence, or whether the degree of harm caused by the cartel should be a matter considered only at the stage of sentencing. For those wary of the reliability of prosecutorial discretion, it may be seen as preferable to leave it to the courts to determine whether

- Is there a significant international dimension?
- Will legal, accountancy and investigative skills need to be brought together?
- Is there a need to use the SFO’s special powers?

<sup>123</sup> *Ibid.*

<sup>124</sup> Antitrust Division, above n 100, ch III pt B(1). The other two factors are: (1) whether the allegations or suspicions of a criminal violation are sufficiently credible or plausible to call for a criminal investigation; and (2) what resources will be required to investigate and prosecute the matter.

<sup>125</sup> *Ibid.* Reflecting the focus in the US on the moral wrongfulness of cartel activity (discussed further below), the policy places particular emphasis on the last of these factors, describing it as having the potential to ‘trump’ all of the others on the grounds that it is the ‘Division’s mission ... to seek redress for any criminal antitrust conspiracy that victimizes the federal government and, therefore, injures American taxpayers’: at *ibid.*

<sup>126</sup> Fisse, ‘The Cartel Offence: Dishonesty?’, above n 52, 246. The Australian government has rejected this recommendation: Letter from Tony Smith (Parliamentary Secretary to the Prime Minister) to Brent Fisse, 26 February 2007.

criminal jurisdiction should be invoked based on an assessment of whether the cartel in question breaches a specified harm threshold.<sup>127</sup> By comparison, there are those who argue that cartel conduct is ‘serious’, by definition, and that ‘the proportionate response to criminal conduct is to apply a criminal penalty.’<sup>128</sup> It should follow, so the argument proceeds, that the degree of harm inflicted by the unlawful conduct is reflected in sentencing as distinct from a matter relied on for determining whether to pursue criminal prosecution in the first place.<sup>129</sup> Certainly, the scale of the estimated harm inflicted by the cartel is likely to be relevant in sentencing, as it is in the US and Europe.<sup>130</sup>

Putting the harm threshold aside, there is an element of the proposed offence that appears to be aimed at ensuring that certain arrangements between competitors that are benign (from a competition perspective) are not caught by the offence. That is the element that requires it to be shown that the defendant intended by the arrangement to obtain a gain.<sup>131</sup> As a limiting device, it may be of concern that no gain need to have been obtained in fact and that the size of any gain obtained may be trivial.<sup>132</sup> There is further the possibility that defendants might construct defences based on a claim to have had an altruistic intention, rather than the requisite intention to obtain a gain — for example, the intention to maintain the jobs of their employees, seen as being at risk in the face of brutal competition.<sup>133</sup> Other foreseeable difficulties relate to the problems in this context of distinguishing between intention and knowledge of potential

<sup>127</sup> Fisse, ‘The Cartel Offence: Dishonesty?’, above n 52, 15–16, 50, 52.

<sup>128</sup> Julie Clarke, ‘Criminal Penalties for Contraventions of Part IV of the *Trade Practices Act*’ (2005) 10 *Deakin Law Review* 141, 162.

<sup>129</sup> Ibid.

<sup>130</sup> For the sentencing practice in the US: see United States Sentencing Commission, *Guidelines Manual* (2005) §2R1.1, which sets the base fine for corporations in respect of specific antitrust law offences (bid-rigging, price-fixing and market allocation agreements) as ‘20 percent of the volume of affected commerce.’ For the sentencing practice of the European Commission: see *Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003* [2006] OJ C 210/2; Christopher Harding, ‘Business Cartels as Criminal Activity: Reconciling North American and European Models of Regulation’ (2002) 9 *Maastricht Journal of European and Comparative Law* 393, 411–12; Wouter P J Wils, ‘The European Commission’s 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis’ (2007) 30 *World Competition* 197.

<sup>131</sup> As previously indicated, the proposed requirement is in fact that the defendant had the intention of ‘dishonestly obtaining a gain’. The dishonesty aspect of this requirement is discussed below in Part V.

<sup>132</sup> Fisse, ‘The Cartel Offence: Dishonesty?’, above n 52, 242–4. Similarly, the proposed offence appears to catch the mere making of an agreement and hence situations in which no harm has been caused would come within its purview (theoretically at least). This tends to undermine the argument that the conduct to be criminalised is morally reprehensible, unless one takes the view that the agreement in itself is reprehensible (along the lines of Harding’s argument: see below Part V).

<sup>133</sup> Clarke, above n 128, 160. It is true that such an intention in fact would fall within the proposed element as described in the then Treasurer’s press release which referred to a ‘pecuniary or non-pecuniary gain, either for the defendant or *for another person*’: see Costello, above n 1 (emphasis added). However, criminalisation of an intention to save workers’ jobs would seem to be an unintended (pardon the pun) result.

consequences or effect, and between short-term or immediate intentions and longer-term or ultimate intentions.<sup>134</sup>

Despite these difficulties, seen as in effect an ‘intention to increase bargaining power at the expense of those with whom the cartel deals’, this proposed element of the offence does have the potential to limit its scope in several useful ways.<sup>135</sup> In particular, the effect of requiring such an intention would be to exclude from the scope of the offence four scenarios in which it is difficult to imagine a case for liability, namely:<sup>136</sup>

- 1 ‘[c]ollaborative agreements entered into to create value’;
- 2 ‘[a]greements with no sustained effect on price levels’;
- 3 ‘[a]greements among members of a network that competes against another network’ (for example, a national football code or credit card network); and
- 4 ‘[a]greements between negotiating partners to engage in joint negotiations’.

## V WRONGFULNESS

Green’s third basic element of moral content in white-collar criminal offences, wrongfulness, refers to ‘the violation of a moral norm that occurs when a criminal act is committed.’<sup>137</sup> Adopting a non-consequentialist or deontological approach, Green takes the view that ‘what makes an act wrongful is some intrinsic violation of a freestanding moral rule or duty, rather than the act’s consequences.’<sup>138</sup> Such wrongfulness, he observes, ‘is typically directed towards a particular person or group of persons’.<sup>139</sup> Wrongfulness in this context is analytically distinct from culpability and harmfulness.<sup>140</sup> It is seen as especially significant in the field of white-collar crime given that in this context there is often difficulty in distinguishing between morally acceptable and morally unacceptable conduct.<sup>141</sup> That in part is because the same harms may flow from

<sup>134</sup> Clarke, above n 128, 160–1. For reference to the cases in which this distinction has been shown to be problematic in construing the requisite anti-competitive purpose under the civil prohibition: see above n 69.

<sup>135</sup> Fisse, ‘The Cartel Offence: Dishonesty?’, above n 52, 243, citing Williams, above n 12.

<sup>136</sup> Ibid. For further analysis of the range of collaborative arrangements between competitors that may or may not have anti-competitive effects: see Andrew Harpham, Donald Robertson and Philip Williams, ‘The Competition Law Analysis of Collaborative Structures’ (2006) 34 *Australian Business Law Review* 399.

<sup>137</sup> Green, *Lying, Cheating, and Stealing*, above n 22, 39.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> In terms of mens rea, the wrongfulness of an act may depend upon whether or not it is intentional. However, an act can also be wrongful even when the defendant is not culpable, for example, where the defendant has an excuse recognised by the law. Similarly, while morally wrongful acts frequently cause or risk causing harm, they need not necessarily do so. For example, cheating or lying, of particular significance for present purposes (as explained below), is wrongful but may not cause any harm to others: see Green, ‘Why It’s a Crime to Tear the Tag off a Mattress’, above n 20, 1552.

<sup>141</sup> It is this difficulty that has led many theorists to criticise the use of criminal sanctions in relation to economic activity, arguing that in the absence of clear moral wrongfulness, the harmfulness of certain business activities is not sufficient to justify their criminalisation: see Green, ‘Why It’s a Crime to Tear the Tag off a Mattress’, above n 20, 1561–2 fnn 82–93. See also Kadish,

lawful conduct (as in the case of vigorous competition, for example) and unlawful conduct (as in the case of collusion between competitors).<sup>142</sup>

In relation to the civil regulation of competition in Australia, there has been longstanding opposition to the idea that morality has any role to play in the policy underpinning, or the interpretation or application of, the law. No more authoritative statement of this view can be found than that of the High Court in its first and still most influential judgment on the proper approach to be taken to the competition provisions of the *TPA*.<sup>143</sup> The decision of the Court has been lauded for its acknowledgement that the competition provisions of the *TPA* reflect 'economic law'.<sup>144</sup> There, Deane J, reflecting the views of the Court generally, made it clear that the notions and objectives of the law are to be seen as 'economic and not moral ones'.<sup>145</sup>

In light of this view it is to be expected that, with the introduction of criminal sanctions, the treatment of morality as a relevant consideration in Australian competition law will attract differences of opinion. There will be those who resist the idea that criminalisation necessarily brings a moral dimension to this area of the law.<sup>146</sup> By contrast, conscious, it seems, of a need to justify criminalisation on more than harm grounds, the ACCC invoked the rhetoric of morality early on in its public campaign for criminal penalties for cartel conduct. Describing the targeted conduct as 'morally reprehensible',<sup>147</sup> it likened so-called 'hard core' collusion to theft and fraud, and other forms of white-collar crime, and called for a penalty regime that had punishment as an object, alongside deterrence.<sup>148</sup> However, when it came to formulating the offence itself, the ACCC initially shied away from incorporating any element that might expressly reflect the notion of moral wrongfulness.<sup>149</sup> Specifically, it rejected the idea that dishonesty might be included as a mental element, as it has been in the UK.<sup>150</sup> In that jurisdiction, the incorporation of dishonesty as an offence element has been

above n 19, 425–6: since the unlawful conduct 'is not criminal under traditional categories of crime and ... closely resembles aggressive business behavior, the stigma of moral reprehensibility does not naturally associate itself with the regulated conduct.'

<sup>142</sup> Green, *Lying, Cheating, and Stealing*, above n 22, 40. Indeed this was the very point made by Mason CJ and Wilson J in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 191: 'Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective competitors by taking sales away.'

<sup>143</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177.

<sup>144</sup> Maureen Brunt, "'Market Definition' Issues in Australian and New Zealand Trade Practices Litigation" (1990) *Australian Business Law Review* 86, 88–9.

<sup>145</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 194.

<sup>146</sup> See Williams, above n 12, 1; Bill Reid and Elizabeth Henderson, 'Cartels — Criminal Sanctions and Immunity Policy' (2006) 14 *Trade Practices Law Journal* 199, 202.

<sup>147</sup> Fels, above n 45; ACCC, above n 49, 20.

<sup>148</sup> See above n 147.

<sup>149</sup> ACCC, above n 49.

<sup>150</sup> *Enterprise Act 2002* (UK) c 40, s 188(1): 'An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B).' Section 188(2) then sets out six categories of arrangement (consistent with the OECD definition) that if implemented, will be deemed to fall within the terms of the offence.

seen as a means of bolstering the moral justification for imposing criminal sanctions on cartel behaviour.<sup>151</sup>

Despite its initial opposition to the idea, in a subsequent submission the ACCC expressed the view that a dishonesty requirement in the offence would be desirable.<sup>152</sup> However, the explanation offered for its change of position was far from persuasive<sup>153</sup> and its reservations were apparent still in its suggestion of an alternative approach should the Dawson Committee not favour dishonesty.<sup>154</sup> In its submission to the working party charged with designing the offence, the influential professional body, the Law Council of Australia, supported the inclusion of dishonesty: ‘the requirement of dishonesty is appropriate as it reflects the morally reprehensible character of conduct for which criminal sanctions are appropriate.’<sup>155</sup> Support for a dishonesty element was also forthcoming from at least some academic commentators as an appropriate means of distinguishing ‘between conduct that is criminal and that which remains subject to civil penalties alone’.<sup>156</sup> Evidently, the government agreed.<sup>157</sup>

However, reliance on dishonesty as an element of the mens rea for a cartel offence has been criticised in both Australia and the UK.<sup>158</sup> The criticism stems primarily from concerns relating to the common law test of dishonesty, which requires the relevant conduct to have been: (1) dishonest according to the standards of ordinary people; and (2) known to the defendant to be dishonest according to the standards of ordinary people.<sup>159</sup> In relation to the first, objective limb of the test, Fisse has pointed to concerns regarding its definition and

<sup>151</sup> See Sir Anthony Hammond and Roy Penrose, *Proposed Criminalisation of Cartels in the UK: A Report Prepared for the Office of Fair Trading* (2001) 10.

<sup>152</sup> This submission was not made public at the time but was referred to in the report of the Dawson Committee: see Trade Practices Act Review Committee, above n 11, 155. It has since become available, however: see above n 99.

<sup>153</sup> The ACCC took the view in its later submission that it would be necessary to incorporate a requirement of dishonesty in the offence so as to ensure that arrangements, such as those entered into by the banks that set credit charge interchange fees (which the ACCC argues amounts to price-fixing), are not treated as criminal offences: see *ibid*. This argument, according to Fisse, is ‘sheer nonsense’ — ‘if the cartel offence should not apply to cases where the cartel conduct has effects only in downstream markets then the appropriate mechanism is an exemption drafted simply in those terms’: see Fisse, above n 99.

<sup>154</sup> The alternative was that the mental element be formulated to require that the defendant knew that the conduct breached or was likely to breach cartel laws. This alternative was not attractive to the Dawson Committee, perhaps understandably given it runs counter to the general principle that ignorance is no excuse. See also *ibid*.

<sup>155</sup> Submission to the Working Party on Penalties for Cartel Behaviour, Department of the Treasury, 12 December 2003 (Trade Practices Committee, Business Law Section, Law Council of Australia).

<sup>156</sup> Clarke, above n 128, 159 (citations omitted). See also Castle and Writer, above n 11, 8–10, 13.

<sup>157</sup> Costello, above n 1.

<sup>158</sup> Dishonesty is not an element of the offence in any other jurisdiction that has criminal cartel laws and was not identified by the OECD in its definition of the conduct warranting tougher enforcement and deterrence measures: *Recommendation of the Council*, above n 9. Notably, even the Commonwealth DPP has been reported as having advised the government against the dishonesty proposal: see ‘Regulator to Tap Phones in Cartels Blitz’, *The Australian Financial Review* (Melbourne), 24 October 2007, 1, 4.

<sup>159</sup> This test was articulated by the English Court of Appeal in *R v Ghosh* [1982] QB 1053 and has been codified in s 130.3 of the *Criminal Code*.

application in other contexts.<sup>160</sup> In connection specifically with the cartel offence, he has drawn attention to the inherent difficulties in asking a jury to determine 'the standards of ordinary people' in a context with which they are unfamiliar.<sup>161</sup> This problem will only be aggravated, he argues, by the moral ambiguity that attends cartel activity and by the fact that the law itself authorises some forms of collusion.<sup>162</sup>

Fisse has criticised the second limb of the test as being excessively subjective.<sup>163</sup> This limb, he argues, will only succeed in providing defendants with the opportunity to test 'ingenious and unmeritorious defences'.<sup>164</sup> As examples, he conjures scenarios where a defendant may be able to point to the receipt of legal or expert economic advice concluding that the conduct in question was unlikely to substantially lessen competition or may be able to persuade a jury that the intention was a pro-competitive or welfare-enhancing one, such as to achieve capacity to compete against imports from large overseas competitors. Such scenarios might well convince a jury that the conduct was not known by the defendant to be dishonest according to the standards of ordinary people.<sup>165</sup>

Criticisms similar to those made by Fisse have been made of the incorporation of dishonesty in the offence in the UK — by Christopher Harding, in particular.<sup>166</sup> Harding has maintained nevertheless that it is important to find some

<sup>160</sup> Fisse, 'The Cartel Offence: Dishonesty?', above n 52, 255–7, citing The Law Commission, England and Wales, *Legislating the Criminal Code: Fraud and Deception*, Consultation Paper No 155 (1999). But see D W Elliott, 'Dishonesty in Theft: A Dispensable Concept' [1982] *Criminal Law Review* 395; Andrew Halpin, 'The Test for Dishonesty' [1996] *Criminal Law Review* 283. Cf Gary Scanlan, 'Dishonesty in Corporate Offences: A Need for Reform?' (2002) 23 *The Company Lawyer* 114, which expresses support for the dishonesty test.

<sup>161</sup> Fisse, 'The Cartel Offence: Dishonesty?', above n 52, 33, 38, citing Edward Griew, 'Dishonesty: Objections to Feely and Ghosh' [1985] *Criminal Law Review* 341, 345; Oliver Black, *Conceptual Foundations of Antitrust* (2005) 128. The counter-argument is that dishonesty is a well-established concept in the criminal law and is widely used in other white-collar criminal offences including under the corporations law and in the fraud context: see Costello, above n 1; Clarke, above n 128, 160.

<sup>162</sup> Fisse, 'The Cartel Offence: Dishonesty?', above n 52, 249. This point has also been made by other commentators: see, eg, Reid and Henderson, above n 146, 207. Fisse's concerns appear supported by the findings of a recent British survey in which only 63 per cent (six in 10 Britons) were reported to believe that price-fixing is dishonest. This is a surprising finding given that a majority of respondents (73 per cent) recognised that price-fixing is harmful and considered that it should be punished: see Andreas Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (CCP Working Paper 07-12, ESRC Centre for Competition Policy & Norwich Law School, University of East Anglia, 2007) 3.

<sup>163</sup> A criticism which, he notes, has also been made in the context of property offences: Fisse, 'The Cartel Offence: Dishonesty?', above n 52, 262.

<sup>164</sup> A description in fact coined by Harding and Joshua, who raised concerns similar to those expressed by Fisse in relation to the adoption of a dishonesty element in the new UK offence: Christopher Harding and Julian Joshua, 'Breaking Up the Hard Core: the Prospects for the Proposed Cartel Offence' [2002] *Criminal Law Review* 933, 938; see below n 166 and accompanying text.

<sup>165</sup> Fisse, 'The Cartel Offence: Dishonesty?', above n 52, 265–6. Furthermore, Fisse criticises the 'inegalitarian bias' likely to be introduced to this area of the law by the 'gift' that the subjective limb of the *Ghosh* test would present to 'smart, well resourced corporate defendants': at 44–5.

<sup>166</sup> Harding and Joshua, above n 164, 937–8. See also George Peretz and James Lewis, 'Go Directly to Jail: Losing Badly in "Monopoly"' (2003) *New Law Journal* 99.

method of capturing and communicating the immorality of cartel conduct.<sup>167</sup> In particular, he points to the approach taken in the US where it is the element of conspiracy that has attracted the moral censure warranting criminal consequences.<sup>168</sup> The focus in that jurisdiction is on the conduct or, as Harding calls it, the ‘bad attitude’ of the cartel participants.<sup>169</sup> Contrasting this ‘conduct-oriented’ approach that treats the ‘cartel as a conspiracy’ with an ‘outcome-oriented’ approach which treats the ‘cartel as an instrument of damage’,<sup>170</sup> Harding argues that for the criminalisation project to succeed in jurisdictions outside of the US, it will be necessary to recognise that it is not just the anti-competitive outcome that is morally objectionable, but also the act of collusion.<sup>171</sup> In particular, he suggests that the focus should be on ‘the deliberate, covert and knowingly unlawful collective scheming and planning to achieve those anti-competitive ends.’<sup>172</sup> In this way, ‘the infrastructure of such scheming and planning becomes the focus for its regulation as a delinquent and punishable activity.’<sup>173</sup>

Whether by way of focus on conspiracy or dishonesty, the assumption seems to be that the moral wrongfulness in cartel activity needs to be made explicit through an element of the offence. However, Green’s analysis of white-collar crime through the lens of everyday moral norms offers an alternative approach.<sup>174</sup> Under this approach, the physical elements of the offence (price-fixing, market division, output restriction and bid-rigging) may be seen as tantamount to the violation of one or more of the moral norms against cheating, deceiving or stealing. In this way, they may be conceptualised as implicitly wrongful, thereby removing the need to articulate independent and potentially problematic bases for establishing their wrongfulness.

Each of the physical elements involved in the proposed cartel offence appears to fit Green’s paradigm of cheating.<sup>175</sup> Take a highly simplified case of

<sup>167</sup> Failure to do so, Harding argues, is likely in the long run to impair support for the new law from key stakeholders and, ultimately, undermine its effectiveness: Harding, ‘Business Collusion as a Criminological Phenomenon’, above n 5, 183. See also Stucke, above n 14.

<sup>168</sup> This flows in part from the wording of § 1 of the *Sherman Act*, 15 USC §§ 1–7 (2000 & Supp IV, 2004), which declares illegal ‘[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations’ and in part from the way in which it has been interpreted by the courts: see Harding, ‘Business Cartels as Criminal Activity’, above n 130, 410. See also Stucke, above n 14, 503.

<sup>169</sup> Harding, ‘Business Cartels as Criminal Activity’, above n 130, 412.

<sup>170</sup> Ibid 410–12.

<sup>171</sup> Christopher Harding, ‘Forging the European Cartel Offence: The Supranational Regulation of Business Conspiracy’ (2004) 12 *European Journal of Crime, Criminal Law and Criminal Justice* 275, 284–5.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid. Harding does acknowledge, however, that if this ‘idea of contumacious, arrogant and furtive business conspiracy’ is to supply the culpability necessary for criminal law purposes, the difficulty becomes how to cast it effectively in legal language for the purposes of encouraging prosecution and securing conviction: see Harding, ‘Business Collusion as a Criminological Phenomenon’, above n 5, 200–1. He also acknowledges that for English criminal law, ‘the concept of conspiracy raises some particular problems relating to the reluctance to make criminal an agreement to do something which is not criminal (for instance, price-fixing, not in itself a criminal act)’: see Harding, ‘Business Cartels as Criminal Activity’, above n 130, 418. Presumably, the same issue would arise in the Australian context: see *Criminal Code* s 11.5.

<sup>174</sup> See above Part I.

<sup>175</sup> This paradigm is explained in Green, *Lying, Cheating, and Stealing*, above n 22, 56–66. See also Stucke, above n 14, arguing that antitrust ‘is grounded in the moral norm of fairness’ (at 495)

price-fixing as an example. Say firms A and B sell widgets and they enter into an arrangement to fix the price at which they sell their widgets. Applying each of the requirements of Green's paradigm to these simple facts it is possible to say that A and B have cheated. First, they must be shown to have broken a rule.<sup>176</sup> In this case, A and B could be said to have broken the rule that in a market-based economy, participants in a market must make decisions about their terms of trade independently of each other. Such a rule would meet Green's criteria in that it is general, prescriptive, mandatory, regulative, directed at conduct and constitutes a standard.<sup>177</sup> It would also satisfy the requirements that it be fair and fairly enforced.<sup>178</sup> Assume that there is no question that A and B's rule-breaking was intentional — the second of Green's requirements.<sup>179</sup> The third requirement is that they have acted with the intention of obtaining an advantage over parties with whom they are in a 'cooperative, rule-bound relationship'.<sup>180</sup> In this scenario, those parties (the so-called 'victims' of the cheating) are most obviously A and B's competitors, although they might also be customers or suppliers. The cheaters and their victims participate in the 'mutually beneficial co-operative enterprise'<sup>181</sup> that is the market. In order to derive the benefits of this enterprise, they agree to abide by its rules, including the rule that dictates independent decision-making. By breaking the rule, A and B have sought to gain an unfair advantage over others in the market who have respected it. In this way they may be said to have cheated. Of course, this account says nothing about the conditions under which A and B are most likely to enter into such an arrangement or under which their arrangement is likely to be the most sustainable or effective (given that such matters are seen as irrelevant to the moral status of their behaviour).<sup>182</sup>

By entering into their price-fixing arrangement, A and B may also be seen to have violated the norm against deception.<sup>183</sup> As defined by Green, 'deception' involves 'the communication of a message with which the communicator, in communicating, intends to mislead — that is, the communication of a message that is intended to cause a person to believe something that is untrue'.<sup>184</sup> By

and observing that '[t]he attainment of material prosperity by unfairly disadvantaging others has long been censored': at 498.

<sup>176</sup> Green, *Lying, Cheating, and Stealing*, above n 22, 58.

<sup>177</sup> Ibid 58–62.

<sup>178</sup> Ibid 63. Admittedly though, it may be subject to justified exceptions as in the case of arrangements between competitors that may be authorised on the grounds of public benefit and the case of collective bargaining by small firms, in particular: see above nn 40–1 and accompanying text.

<sup>179</sup> Ibid 64.

<sup>180</sup> Ibid 57, 65–6.

<sup>181</sup> Ibid 64.

<sup>182</sup> There is, however, voluminous economic literature on such matters: see, eg, Alexis Jacquemin and Margaret E Slade, 'Cartels, Collusion, and Horizontal Mergers', in Richard Schmalensee and Robert D Willig (eds), *Handbook of Industrial Organization* (1989) vol 1, 415; David K Round and John J Siegfried, 'Horizontal Price Agreements in Australian Antitrust: Combatting Anti-Competitive Corporate Conspiracies of Complicity and Connivance' (1994) 9 *Review of Industrial Organization* 569.

<sup>183</sup> As explained in Green, *Lying, Cheating, and Stealing*, above n 22, 76–87. This norm could apply equally to a market-sharing, output restriction or bid-rigging arrangement.

<sup>184</sup> Ibid 76. Green distinguishes between lying and misleading, making it clear that the former (for which much stricter conditions must be met) is not necessary in order to establish deception.

otherwise presenting themselves as competing widget suppliers, A and B may be taken to have intended to communicate the message that they set their prices independently of each other and thereby have intended to mislead widget buyers or rival widget suppliers.<sup>185</sup> Equally, the message that A and B may have intended to communicate by their price-fixing may be that their products are of the same or similar quality, or possibly that their products are of a certain quality compared with other products in the market, when such a message may be untrue. The case for deception is probably even stronger in the case of bid-rigging in which X and Y agree in advance of submitting their tenders that, say, X's tender price should be lower than Y's price with the aim that the tender be won by X. In such a scenario, the tenderers would be said to have intended to mislead the party letting the tender by communicating the message that they had prepared their tenders independently of and in competition with each other, when in fact the opposite is true.<sup>186</sup>

As previously mentioned, a recurring theme in the ACCC's and the government's statements rationalising the introduction of criminal sanctions has been an analogy between serious cartel conduct and theft.<sup>187</sup> Green argues that the concept of stealing has 'an independent moral significance, which is neither wholly derivative of law nor wholly reducible to other moral norms'.<sup>188</sup> He defines stealing as tantamount to intentionally violating, in some fundamental way, another person's morally legitimate rights of ownership in a particular piece of property.<sup>189</sup> In the cartel context, there seems to be no reason why Green's concept of stealing could not apply to the 'overcharge' that customers are forced to pay by reason of a price-fixing arrangement.<sup>190</sup> In other words, what is stolen is the amount that is paid constituting the margin between the competitive price (that is, the price that would have prevailed absent the cartel) and the cartel price. Measuring this margin is notoriously difficult.<sup>191</sup> Such difficulty and the precise

<sup>185</sup> Notably, deception along these lines is referred to in the then Treasurer's press release in justifying the incorporation of dishonesty as an element of the new offence: 'Dishonesty goes to the heart of serious cartel conduct, where customers are deceived when purchasing goods or services, unaware that the price and supply of those goods and services were determined by collusion, rather than competition': Costello, above n 1.

<sup>186</sup> In situations where tenderers have signed up to protocols forbidding bid-rigging activity (as is increasingly common in relation to government outsourcing), such conduct could also constitute a breach of Green's moral concept of promise-breaking: see Green, *Lying, Cheating, and Stealing*, above n 22, 107–13.

<sup>187</sup> This has been so despite the fact that, in its submission to the Dawson Committee, the ACCC gave as one of its reasons for initially rejecting the incorporation of dishonesty as an element of the new offence, the contrast between cartel activity and theft: 'A person can acquire property with a number of different intentions, but it is dishonesty that makes them criminal — whereas there is unlikely to be an honest reason for entry into a cartel arrangement': ACCC, above n 49, 46. Notwithstanding this qualification, in subsequent public statements by the Chairman of the ACCC, the analogy with theft re-emerged: see, eg, Graeme Samuel, 'The Enforcement Priorities of the ACCC' (Speech delivered at the Competition Law Conference, 12 November 2005) 11: 'I make no apology for describing cartels as a form of theft'.

<sup>188</sup> Green, *Lying, Cheating, and Stealing*, above n 22, 88.

<sup>189</sup> Ibid 89–91.

<sup>190</sup> It could apply equally, albeit less directly, to a market division, output restriction or bid-rigging arrangement.

<sup>191</sup> See generally Connor and Lande, above n 114. For a recent illustration of the nature of the econometric evidence required for this purpose: see *Darwalla Milling Co Pty Ltd v F Hoffmann-La Roche Ltd [No 2]* (2007) ¶ATPR 42-134.

quantum of the cartel ‘mark-up’, however, are irrelevant to the moral wrongfulness of the activity. There is no question that the ‘thieves’<sup>192</sup> in this context have the relevant intention, that is, an intention to deprive customers of their commodifiable property, namely their money, thereby violating their morally legitimate rights.

## VI CONCLUSION

Applying Green’s framework, the proposed formulation of the Australian cartel offence reflects an attempt by the legislative drafters to ensure that only conduct that is sufficiently culpable, harmful and wrongful is caught by the offence. That said, the analysis in this article demonstrates that there is still substantial work to be done by way of refining and, in some respects, rethinking altogether the design and policy for enforcement of the new offence. With the election of a new government, there is an opportunity to undertake this reappraisal without the risk of appearing to retreat from previous positions and with the benefit of a more transparent and consultative process that was so lacking in the previous government’s approach.<sup>193</sup>

### A Culpability

In relation to culpability, it is proposed to make intention, the highest standard of culpability recognised by the criminal law, the mens rea with respect to the making of, or giving effect to, a contract, arrangement or understanding and recklessness with respect to the inclusion of an offending provision (with the purpose or effect of fixing prices et cetera) in the contract, arrangement or understanding. Having these fault elements in the offence will distinguish it substantively from the otherwise corresponding civil prohibition. Presumably, however, there will be other criteria that will enable further discrimination on culpability grounds at the stage of determining whether or not to prosecute cartel participants under the new offence. These criteria need to be articulated.<sup>194</sup> In particular, the role of firms and individuals in the establishment and maintenance of the cartel should be stipulated as relevant considerations. Furthermore, there needs to be (if there has not been yet) serious consideration given to ways in which an appropriate standard of culpability might be reflected in defences to the

<sup>192</sup> An apt description given the ACCC Chairman’s recent denunciation of cartel participants as ‘well-dressed thieves’: ‘Cartel Ringleaders Are Well-Dressed Criminals, So Why Not Send Them to Jail’, *The Age* (Melbourne), 3 November 2007, *BusinessDay* 2.

<sup>193</sup> For a list of the immediate steps that should be taken in this regard, see Christopher Hodgekiss, ‘Commentary on Paper by Caron Beaton-Wells: “Criminalising Cartels: A Slow Conversion?”’ (Commentary delivered at the Fifth Annual University of South Australia Trade Practices Workshop, Rowland Flat, 19 October 2007).

<sup>194</sup> Preferably beyond the general statement in the *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2<sup>nd</sup> ed, 1990) [2.10] that ‘factors which may arise for consideration in determining whether the public interest requires a prosecution include: ... (f) the degree of culpability of the alleged offender in connection with the offence’.

offence, both defences based on those that currently apply to the civil prohibition and any new defences (such as a defence based on mistake of law).<sup>195</sup>

### B *Harmfulness*

In relation to harmfulness, it is proposed that investigations and prosecutions be limited to cartels that have a significant market impact (particularly in terms of detriment to consumers) and to facilitate this, a value of affected commerce threshold set at \$1 million within a 12-month period is proposed. The concern has been raised, however, as to whether a threshold based on a fixed monetary value is capable of ensuring that only seriously harmful cartels are subject to criminal investigation, and a percentage-based value of affected commerce has been suggested instead. Certainly the current proposed threshold will be limited in its utility in terms of predicting the competitive impact of a cartel in any given market. However, it is intended as a starting point only in what inevitably will be a detailed enquiry into the scope and effects of a cartel for the purposes of assessing its suitability for criminal prosecution. Following the approach taken in the UK therefore, the threshold should not be over-emphasised or seen as the principal indicator of suitability. Furthermore, it should be credited with the attributes of transparency and simplicity — attributes that are important in the context of a criminal system, for those responsible for administering it as much as for those subject to it. That said, for the same reasons, the approach that is to be taken to assessing market impact and scale of loss (those being the other factors listed in the ACCC–DPP MOU) should be elaborated upon in greater detail (as they are in the US, for example) than currently appears to be proposed.

Given the gravity of the potential consequences flowing from a finding of guilt and the scarcity of the resources available for investigation and prosecution, there seems little justification for postponing consideration of harmfulness to the stage of sentencing. The question as to whether a harm criterion should be made a jurisdictional element of the offence, as distinct from a constraint on investigatory and prosecutorial discretion, however, is more difficult to assess. The answer is likely to vary depending on the level of confidence one has in the administrative agencies charged with the tasks of investigation and prosecution. It may also turn on the degree of risk one perceives in the prospects of lengthy and complex evidence and argument about a threshold jurisdictional issue, delaying and distracting parties and the court from consideration of the substantive elements of the offence. Given what is known about the skill and tenacity of white-collar criminal lawyers,<sup>196</sup> such a risk should not be underestimated.

### C *Wrongfulness*

In relation to wrongfulness, it is evident that the ‘dishonestly obtaining a gain’ element in the proposed offence has been formulated with a view to capturing the moral reprehensibility of the criminalised conduct thereby distinguishing the

<sup>195</sup> Mirroring the practice in the US of not prosecuting those who were not aware of, or did not appreciate the consequences of, their actions: see above n 101 and accompanying text.

<sup>196</sup> See Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* (1985).

criminal offence from the civil prohibition. These objectives are laudable. However, the proposed approach to achieving such aims is misguided for at least four reasons. First, the reality is that, in most cases, cartel activity will involve dishonesty and an intention by the parties to derive some advantage at the expense of customers and other competitors. It is therefore highly questionable whether making these aspects of the conduct explicit will in fact provide a clear and legitimate method of distinguishing between conduct that should be criminally liable and conduct that is made subject to civil liability only. Secondly, the proposed approach involves importing concepts from other contexts that may not be appropriate and in fact may weaken the enforcement potential of the new regime. In particular, this is illustrated by the criticisms that have been made of the adoption of dishonesty as a requirement of the offence. Thirdly, each of the relevant physical acts involved in the offence (for example, price-fixing and market division) is inherently morally wrongful because, deconstructed in the way Green suggests, they can be seen to entail one or more of cheating, deception or stealing. There is, therefore, arguably no need to superimpose requirements that will inevitably complicate, and may even undermine, the enforcement of the new criminal offence. Finally, as previously stated, the criminal offence will be distinguishable, in terms of its elements, from the civil prohibition by virtue of having to prove the relevant mental elements, as well as the physical elements of the offence. Hence, there is no need to add dishonesty as a further distinguishing element. Further distinction will arise from the operation of the enforcement policy, as encapsulated in the MOU, from which it is clear that the criminal offence will be invoked only in cases in which the ACCC and DPP are satisfied that the cartel has caused or has the potential to cause serious harm.

If this analysis is accepted, then arguably it should be left to the government, the relevant administrative agencies and the courts to ensure that the moral wrongfulness of hard core cartel conduct is clearly conveyed in ways other than through the statutory wording of the new offence. The mere fact of criminalisation with the attachment of serious sanctions and the attendant stringent burden of proof is a useful start in this regard given that the legislative invocation of the criminal law plays an important role in shaping perceptions of what is moral (and immoral) conduct in society.<sup>197</sup> The application of those sanctions, however, will be just as, if not more, crucial in serving the deterrent and educative functions intended to be served by the criminal regime and, in particular, in communicating the moral message in relation to hard core cartels.<sup>198</sup> Vigorous enforcement of the new law, combined with appropriate publicity of prosecutorial successes

<sup>197</sup> See above n 30 and accompanying text. In respect of corporations especially, such sanctions should not be confined to criminal conviction and fines. Indeed fines may not be a strong vehicle for projecting or communicating the moral wrongfulness of serious cartel conduct as they are essentially a pricing mechanism. In order to reflect the undesirable dimension of an offence, sanctions against corporations that have expressive capability are required — for example, punitive adverse publicity orders (for which there is already provision in TPA s 86D); punitive community service orders (see TPA s 86C) and punitive injunctions. See, eg, Australian Law Reform Commission, *Principled Regulation*, Report No 95 (2002) ch 28; Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 *Southern California Law Review* 1145.

<sup>198</sup> Ball and Friedman, above n 21.

emphasising the wrongfulness of the activity rather than just its social harm, will be necessary in this regard.<sup>199</sup> So too will be the willingness of the courts to impose sentences that adequately reflect the moral reprehensibility associated with criminal behaviour. These are challenges, however, that still lie a considerable way ahead.<sup>200</sup>

<sup>199</sup> See, eg, Thomas O Barnett, 'Seven Steps to Better Cartel Enforcement' (Paper presented at the 11<sup>th</sup> Annual Competition Law and Policy Workshop, European Union Institute, Florence, 2 June 2006).

<sup>200</sup> For further discussion of some of these challenges: see Beaton-Wells, 'Criminalising Cartels: A Slow Conversion?', above n 32.