

**THE PROPOSED AUSTRALIAN CARTEL OFFENCE:
THE PROBLEMATIC AND UNNECESSARY ELEMENT OF DISHONESTY ***

Brent Fisse

Associate

Parsons Centre of Commercial, Corporate and Taxation Law

University of Sydney Faculty of Law

Adjunct Professor of Law

La Trobe University

**Brent Fisse
Lawyers
70 Paddington St
Paddington, NSW 2021
(02) 9331 6277
0411 528 122**

**brentfisse@ozemail.com.au
www.brentfisse.com**

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CONTENTS

1.	SUMMARY	1
2.	DEFINING "SERIOUS CARTEL CONDUCT"	5
2.1	The Criminalisation Proposals	5
2.2	"Dishonesty" does not limit the Cartel Offence to "serious cartel conduct"	8
2.3	"Intention to obtain a gain" does not limit the Cartel Offence to "serious cartel conduct"	9
2.4	The Cartel Offence will define cartel conduct more narrowly than the per se prohibitions against price fixing and exclusionary provisions under the Trade Practices Act but the Cartel Offence is to be a per se offence and will not require the actual or likely causing of serious harm	12
2.5	The MOU outlined in the Press Release will limit the application of the Cartel Offence but raises some issues, especially the under-inclusiveness and the over-inclusiveness of the proposed \$1 million value of affected commerce threshold	13
2.6	Potential limiting effect of: (a) the mental element of the Cartel Offence (apart from the requirement of an intention to dishonestly obtain a gain); and (b) the principle of corporate criminal responsibility applicable to the Cartel Offence	17
2.7	Limiting effect of the joint venture defence under sections 76C and 76D	20
2.8	Non-definitional indicators of offence seriousness	21
3.	QUESTIONABLE ORIGINS OF DISHONESTY AS AN ELEMENT OF THE CARTEL OFFENCE	22
3.1	Lineage of the element of dishonesty under the Criminalisation Proposals	22
3.2	Bloodline analysis of the element of dishonesty under the Enterprise Act 2002 (UK)	24
3.3	Dishonesty is not part of the definition of cartel offences in jurisdictions other than the UK	27
3.4	Dishonesty is not mentioned in the OECD or ICN definitions of serious cartel conduct	28
4.	DISHONESTY – "STANDARDS OF ORDINARY PEOPLE"	28
4.1	The <i>Ghosh</i> test as adopted under the Commonwealth Criminal Code	28
4.2	"Standards of ordinary people" in offences against property	29
4.3	"Standards of ordinary people" in the context of the Cartel Offence	33
4.4	"Standards of ordinary people" as a populist moral dimension superimposed on the law and economics of cartel conduct	37
5.	DISHONESTY – KNOWLEDGE THAT THE CONDUCT IS DISHONEST ACCORDING TO THE STANDARDS OF ORDINARY PEOPLE	39
5.1	The subjective test of dishonesty under the <i>Ghosh</i> test adopted under the Commonwealth Criminal Code	39
5.2	Problems of excessive subjectivity in offences against property	40

5.3	Problems of excessive subjectivity in the context of the Cartel Offence	41
5.4	Inegalitarian bias	44
6.	ALTERNATIVE POSSIBLE APPROACHES TO DEFINITION OF THE “CARTEL OFFENCE”	45
6.1	Options and definitional parameters	45
6.2	Redefine dishonesty for the cartel offence?	47
6.3	Constraints on prosecutorial discretion and judicial discretion to dismiss a charge	48
6.4	Mental element of the cartel offence	49
6.5	Physical elements of the cartel offence	52
6.6	Exemptions and defences	54
6.7	Corporate criminal responsibility	56
6.8	Resulting offence of “Conspiracy to Subvert Competition” without a dishonesty element	59
7.	CONCLUSION – WHY DISHONESTY?	62

Abstract

Proposals for the criminalization of serious cartel conduct were announced by the Treasurer of Australia in a press release on 2 February 2005 (**Criminalisation Proposals**). The cartel offence to be introduced under those proposals 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 understanding is made or given effect to with the intention of dishonestly obtaining a gain, pecuniary or non-pecuniary and for the defendant or another person, from a person or class of persons likely to acquire or supply the goods or services to which the cartel relates (**Cartel Offence**). The Criminalisation Proposals are problematic. First, the requirement of an “intention to dishonestly obtain a gain” is not a touchstone of serious harm or serious culpability. The “standards of ordinary people” limb of the element of dishonesty is an undefined and undefinable populist notion the practical application of which will create real difficulties for judges and juries as well as for people in business and their advisers. The subjective requirement for dishonesty of “knowledge that the conduct was dishonest according to the standards of ordinary people” will allow large and sophisticated corporations to deny liability and quite possibly obtain an acquittal on the basis of mistake of law and self-preferring beliefs about the morality of their conduct. Secondly, the element of dishonesty is unnecessary given that there are several possible alternatives, including:

- (a) requiring, as a jurisdictional element of the cartel offence and as a guideline for the exercise of prosecutorial discretion, that the specific line of commerce affected by the cartel is likely to represent a minimum percentage (say 20%) or more of the value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market during the period when that specific line of commerce was affected by the cartel or a specified period linked to the time of the alleged offence; and
- (b)(i) requiring, as the core mental element for the offence, a *common intention*: (a) to fix prices or restrict supply; and (b) to increase bargaining power at the expense of those with whom the cartel deals; and
- (ii) narrowing the definition of price fixing, restricting output, bid rigging or market sharing (eg by excluding indirect price fixing in a downstream market from the conduct prohibited by the Cartel Offence).

Keywords: antitrust, cartel, competition law, criminal law, dishonesty, price fixing, boycotts

JEL Classifications: L4, L5, K2, K4

1. SUMMARY

- Proposals for the criminalization of serious cartel conduct were announced by the Treasurer in a press release on 2 February 2005 (**Criminalisation Proposals; Press Release**).¹ The cartel offence to be introduced under those proposals 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 understanding is made or given effect to with the intention of dishonestly obtaining a gain, pecuniary or non-pecuniary and for the defendant or another person, from a person or class of persons likely to acquire or supply the goods or services to which the cartel relates (**Cartel Offence**). The maximum penalties for the Cartel Offence will be a term of imprisonment of five years and a fine of \$220,000 for individuals and a fine for corporations that is the greater of \$10 million or three times the value of the benefit from the cartel, or where the value cannot be determined, 10 per cent of annual group turnover.
- The criminalisation of cartel conduct in Australia, as elsewhere, raises many issues of design. Several key issues of design were not resolved by the Dawson Committee Report in January 2003 and the task of completion of the review was referred back to the Government.² The Government announced on 3 October 2003 that a Working Party on Penalties for Cartel Behaviour (**Working Party**) would consider outstanding issues before the end of 2003.³ The Working Party's recommendations and report have not been published. The Treasury papers for the 2006 Commonwealth Budget said that the criminal cartel provisions were to be introduced to Parliament in the 2006 winter sittings.⁴ The Government has not released an exposure draft Bill for implementing the Criminalisation Proposals. It is unclear whether or not an exposure draft Bill will be made available publicly for comment by all interested parties before any legislation is introduced into Parliament.
- There has been considerable debate about the need for criminalisation of cartel conduct in Australia⁵ as well as internationally.⁶ There has also been widespread comment about

¹ This development has been strongly influenced by the increased focus on criminal prosecution of cartel conduct in the USA and the major influence of the USA in global anti-cartel enforcement; see generally Barnett, "Criminal Enforcement Of Antitrust Laws: The U.S. Model", Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy New York, New York, September 14, 2006; Klawiter, "After The Deluge: The Powerful Effect Of Substantial Criminal Fines, Imprisonment and Other Penalties In The Age Of International Cartels" (2001) 69 Geo Wash LR 745.

² As criticised in Fisse, "The Dawson Review: Enforcement and Penalties" (2003) 9(1) UNSW Law Journal Forum 54 ("The Committee has failed to perform one of its most obvious and important tasks").

³ Treasurer, Press Release, 3 October 2003. See also Clarke, "Criminal Penalties for Contraventions of Part IV of the Trade Practices Act" (2005) 10 Deakin LR 141 at 146.

⁴ Budget Paper No 2 Part 2- Expense Measures – Treasury (2006).

⁵ See eg Fels, "Regulating in a High-Tech Marketplace", 9 June 2001; Fels, "OECD fuels Fels' fight to break cartels" AFR 12 May 2002 1; Fels, "The Trade Practices Act and World's Best Practice: Proposals for

the Criminalisation Proposals.⁷ However, there has been relatively little focus in Australia on one fundamental element of the Proposals, namely dishonesty.⁸ The main argument of this paper is that the concept of dishonesty is problematic and unnecessary as an element of the Cartel Offence.

- In outline, the argument is:⁹
 - (1) the Criminalisation Proposals fall short of adequately reflecting the elusive notion of “serious cartel conduct”¹⁰ largely because the requirement of an “intention to dishonestly obtain a gain” is not a touchstone of serious harm or serious culpability (see section 2, especially sections 2.2-2.5);
 - (2) the idea of making dishonesty an element of a cartel offence appears to have been sired by the Enterprise Act 2002 (UK), but a bloodline analysis reveals that the supporting materials lack any substance and increase the major questions that plague the progeny (see section 3);
 - (3) the “standards of ordinary people” limb of the element of dishonesty is an undefined and undefinable populist notion the practical application of which will create real difficulties for judges and juries as well as for people in business and their advisers (see section 4);

Criminal Penalties for Hard-Core Collusion” (2002); Samuels, “Cracking Cartels: International and Australian Developments” 24 November 2004; Law Council of Australia, Submissions to the Dawson Committee (2002) 8.4, 8.5; Castle & Writer, “More Than a Little Wary: Applying the Criminal Law to Competition Regulation in Australia” (2002) 10 CCLJ 9; Reid, “Cartels – Criminal Sanctions and Immunity Policy (2005) Competition Law Conference 12 November 2005 (observing that criminalisation may drive companies more and more to tacit collusion techniques); Clarke & Bagaric, “The Desirability of Criminal Penalties for Breaches of Part IV of the Trade Practices Act” (2003 31 Australian Business LR 192. On deterring corporate crime, see S Simpson, *Corporate Crime, Law, and Social Control* (2002). On the allocation of corporate and individual accountability for corporate crime, see B Fisse & J Braithwaite, *Corporations, Crime and Accountability* (1993).

⁶ See Harding & Joshua, “Breaking up the Hard Core: The Prospects for the Proposed Cartel Offence” [2002] Criminal LR 933; Joshua & Klawiter, “The UK ‘Criminalization’ Initiative” (2002) (Summer) Antitrust Magazine 67.

⁷ See eg, Law Council of Australia, Submission to the Working Party on Penalties for Cartel Behaviour, 12 December 2003; Clarke, “Criminal Penalties for Contraventions of Part IV of the Trade Practices Act” (2005) 10 Deakin LR 141.

⁸ There has been extensive discussion in the UK of the concept of dishonesty in the cartel offence under the Enterprise Act 2002 s 188; see MacCulloch, “Honesty, Morality and the Cartel Offence” (2006) (I am indebted to the author for making a copy of this unpublished paper available to me); C Harding and J Joshua, *Regulating Cartels in Europe: A Study of the Legal Control of Delinquency* (2003) 261-262; O Black, *Conceptual Foundations of Antitrust* (2005) 127-140; Harding & Joshua, “Breaking up the Hard Core: The Prospects for the Proposed Cartel Offence” [2002] Criminal LR 933; Harding, “Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels” (2006) 14 Critical Criminology 181.

⁹ I am grateful to many for their comments, especially Philip Williams.

¹⁰ It has been claimed that the issue of seriousness is a furphy and that the debate has moved on: Armitage, “Criminalizing Cartel Activity – Lessons from the US Experience” (2004) para 13. However, the Criminalisation Proposals suggest otherwise.

- (4) the requirement for dishonesty of “knowledge that the conduct was dishonest according to the standards of ordinary people” is a subjective test that will allow large and sophisticated corporations to deny liability and quite possibly obtain an acquittal on the basis of mistake of law and self-preferring subjectivised beliefs about the morality of their conduct (see section 5); and
 - (5) the element of dishonesty is unnecessary given that there are several possible alternatives, including:
 - (a) requiring, as a jurisdictional element of the cartel offence and as a guideline for the exercise of prosecutorial discretion, that the specific line of commerce affected by the cartel is likely to represent a minimum percentage (say 20%) or more of the value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market during the period when that specific line of commerce was affected by the cartel or a specified period linked to the time of the alleged offence (see sections 6.5, 6.3); and
 - (b)(i) requiring, as the core mental element for the offence, a *common intention*: (a) to fix prices or restrict supply; and (b) to increase bargaining power at the expense of those with whom the cartel deals (see sections 2.3, 6.4); and
 - (ii) narrowing the definition of price fixing, restricting output, bid rigging or market sharing (eg by excluding indirect price fixing in a downstream market from the conduct prohibited by the Cartel Offence) (see section 6.5).
- The offence should be given a more gripping name than “Cartel Offence”. “Conspiracy to Subvert Competition” is one possible candidate (see section 6.8).
 - The definition of the Cartel Offence or the offence of Conspiracy to Subvert Competition warrants further consideration in a public process of legislative review. Other important questions, including powers of investigation and management of parallel criminal and civil proceedings, also need to be resolved in detail.
 - Nothing in this paper should be taken to assert that:
 - (a) the element of dishonesty will be difficult for jurors to apply in the most blatant cases of cartel conduct, as where the cartelists have fallen into what Harding and

Joshua describe as a “spiral of delinquency”¹¹ or

(b) dishonesty is the most important aspect of the Criminalisation Proposals.

This paper is concerned mainly with the less blatant range of cases of cartel conduct including cases verging on the boundary between criminal and civil liability. The acid test of the definition of an offence is its ability to delimit criminal liability in such cases.¹² Commentators who defend dishonesty as an element of a cartel offence¹³ seem to neglect this point or to assume that less than blatant cases or cases near the border of civil liability will never be prosecuted.¹⁴ There is no apparent justification for making any such assumption. The enterprise of defining the Cartel Offence seeks to ensure that, if prosecuted,¹⁵ less than blatant cases and cases close to the boundary of civil liability will be judged according to law rather than governed by whimsy, loose thinking, prejudice or the self-preferring beliefs of large corporations.

Other dimensions of the Criminalisation Proposals may well be of more practical importance. These include powers of investigation,¹⁶ the management of parallel criminal and civil proceedings,¹⁷ the handling of investigations by target corporations and their executives¹⁸ and the elaborate chess moves required to deal with immunity issues in multiple jurisdictions.¹⁹

¹¹ C Harding and J Joshua, *Regulating Cartels in Europe: A Study of the Legal Control of Delinquency* (2003) 51. The lysine cartel is one example; see Griffin, “An Inside Look at a Cartel at Work: Common Characteristics of International Cartels” (2000). For a comprehensive review of price fixing cases in Australia see Round & Hanna, “Curbing Collusion in Australia: The Role of Section 45A of the Trade Practices Act” [2005] MULR 7.

¹² See further A Ashworth, *Principles of Criminal Law* (5th ed 2006) ch 2; A Halpin, *Definition in the Criminal Law* (2004).

¹³ See eg Armitage, “Criminalizing Cartel Activity – Lessons from the US Experience” (2004) para 13.

¹⁴ Another possibility is to compare section 1 of the Sherman Act and to take it as a prime example of a generally-worded criminal prohibition that seems to have worked well enough. However, the institutional factors that govern prosecutorial discretion in the USA are very different from those in Australia (eg prosecutorial discretion is aligned to the US Sentencing Guidelines; the FTC, which has civil jurisdiction and brings civil actions in numerous cases of eg price fixing, is an active counterbalance to the US DOJ). Another consideration is that the Commonwealth DPP has suffered a credibility problem as a result of community perceptions of disparity in the the DPP’s handling of the Rene Rivkin and Steve Vizard insider trading cases). In any event, the Sherman Act model does not appear to have been influential in the Australian political debate, the heat-seeking detectors of which have locked onto the assumption that any cartel offence should be defined in terms of “serious cartel conduct.”

¹⁵ Query the extent to which the Criminalisation Proposals are animated politically by a desire to use the Cartel Offence more as a placebo than as a platform for actual prosecutions. See generally Aviram, “The Placebo Effect of Law: Law’s Role in Manipulating Perceptions” (2006) 75 *George Washington LR* 101.

¹⁶ See eg Poddar & Leach, “It’s Criminal: The Debate over Penalties for Cartel Conduct” (2003); Clayton Utz, Submission to the Dawson Committee (2002) para 7.5; MacNeil, “Criminal Investigations in Competition Law” [2003] *ECLR* 151.

¹⁷ See Press Release; *Review of the Competition Provisions of the Trade Practices Act* (2003) 156-157; ALRC, Report No 95, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation* (2002) ch 11; ALRC, Report No 68, *Compliance with the Trade Practices Act* (1994) ch 9. Consider the telling account of US enforcement practices in Oesterle, “Early Observations on the Prosecutions of the Business Scandals of 2002-03: On Sideshow Prosecutions, Spitzer’s Clash with Donaldson over Turf, the

2. DEFINING “SERIOUS CARTEL CONDUCT”

2.1 The Criminalisation Proposals

The Criminalisation Proposals reflect the concept of “serious cartel conduct” in three explicit ways:

- the Cartel Offence will require that a defendant have acted with an “intention to dishonestly obtain a gain”;
- the Cartel Offence will define cartel conduct more narrowly than the per se prohibitions against price fixing and exclusionary provisions under the Trade Practices Act; and
- an MOU between the ACCC and DPP will guide and constrain prosecutorial discretion and thereby limit the prosecution of the Cartel Offence to serious cases.

Whether or not the approach outlined captures the idea of “serious cartel conduct” depends on a number of considerations. In particular:

- the element of “dishonesty” does not limit the Cartel Offence to “serious cartel conduct” (see section 2.2);
- the element of “intention to obtain a gain” does not limit the Cartel Offence to “serious cartel conduct” (see section 2.3);
- the Cartel Offence will define cartel conduct more narrowly than the per se prohibitions against price fixing and exclusionary provisions under the Trade Practices Act but the Cartel Offence is to be a per se offence and will not require the actual or likely causing of serious harm (see section 2.4);
- the MOU outlined in the Press Release will limit the application of the Cartel Offence but the proposed \$1 million value of affected commerce threshold is over-inclusive and under-inclusive (see section 2.5);
- no mention is made of the potential limiting effect of: (a) the mental element of the Cartel Offence (apart from the requirement of an intention to dishonestly obtain a gain);

Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation” (2004) 1 Ohio State J of Crim Law 443.

¹⁸ See eg Klawiter, “Antitrust Investigations and Corporate Executives: The Risks in the Courtroom and the Boardroom” (2006).

¹⁹ See eg Spratling, “Making the Decision: What to Do When Faced with International Cartel Exposure – Developments Impacting the Decision in 2006” ABA, Section of Antitrust Law, 54th Antitrust Law Spring Meeting, March 2006.

or (b) the principle of corporate criminal responsibility applicable to the Cartel Offence (see section 2.6);

- account should be taken of the new joint venture defence under sections 76C and 76D of the Act²⁰ (see section 2.7); and
- the extent to which a cartel offence captures the idea of serious cartel conduct depends not only on definitional indicators of offence seriousness but also on: (a) the sanctions that can be imposed; and (b) the rules of evidence and procedure that apply (see section 2.8).

“Intention to dishonestly obtain a gain”

One main element of the Cartel Offence is the requirement that the defendant has engaged in the cartel conduct with an “intention to dishonestly obtain a gain”

The requirement that a defendant have acted dishonestly is seen in the Press Release as an appropriate way of signifying and capturing the seriousness of serious cartel conduct:

Dishonest intent will be proved if a jury is satisfied that the cartel arrangement was dishonest according to the standards of ordinary people, and the defendant knew it was dishonest according to those standards. This definition of dishonesty is consistent with the Criminal Code.

Indicators of dishonesty include deception (such as lies or misleading statements), making or relying upon representations or promises that are known to be false or which would not be carried out, concealing facts that there is a duty to disclose, and engaging in conduct that the defendant knows they have no right to engage in.

Dishonesty goes to the heart of serious cartel conduct, where customers are deceived when purchasing goods and services unaware that the price and supply of those goods and services were determined by collusion, rather than competition.

The Dawson Review put the view that using an element of dishonesty to identify criminal cartel conduct could cause difficulties to a jury. However, dishonesty is an established concept in Australian criminal law and is widely used in corporations and fraud offences. Further, dishonesty appropriately captures the genuinely criminal nature of serious cartel conduct.

²⁰ Trade Practices Legislation Amendment Act 2006, Schedules 3-4.

Cartel conduct

The Cartel Offence will not echo the definitions of the per se prohibitions against price fixing and exclusion provisions under the Trade Practices Act. According to the Press Release, cartel conduct will be defined specifically for the purpose of the Cartel Offence and for civil penalty provisions against cartel conduct:

The cartel offence will capture price fixing, output restrictions, bid rigging and market sharing. In addition to the dishonesty element, the physical elements of the cartel offence (all of which must be satisfied) should comprise that:

- an agreement is made between or given effect to by two or more parties;
- the parties who made the agreement are competitors in the supply or acquisition of goods or services in a particular market; and
- the agreement contains a provision to fix prices, restrict output, share or divide markets or rig bids.

These activities will be explicitly defined in the cartel offence.

Those cartel activities proscribed by the criminal offence will be prohibited per se in the civil regime. There will be no requirement for dishonesty in order to breach the civil cartel provisions.

MOU between ACCC and DPP

The Press Release states that the Cartel Offence will be the subject of prosecution only where “clearly justified” and that an MOU between the ACCC and the DPP will constrain the exercise of prosecutorial discretion by both of these enforcement agencies (**MOU**):

To ensure that the cartel offence targets serious cartel conduct that causes large scale or significant economic harm, the DPP and the ACCC will enter into a formal, publicly available Memorandum of Understanding (MOU), establishing procedures for the investigation of cartel offences and the circumstances in which the ACCC will refer a case to the DPP for prosecution instead of pursuing civil penalties itself. The intention is that the ACCC will not ordinarily refer relatively minor matters to the DPP for criminal prosecution.

The MOU will set out factors that the ACCC must consider before referring a matter to the DPP for possible criminal prosecution. The ACCC would need to consider whether:

- the alleged conduct was longstanding or had, or could have, a significant impact on the market in which the conduct occurred; or
- the alleged conduct caused, or could cause, significant detriment to the public, or a class thereof, or caused, or could cause, significant loss or damage to one or more customers of the alleged participants; or
- one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct, either criminal or civil.²¹

Thresholds will also be included in the MOU to provide further guidance. The ACCC would need to consider whether the value of affected commerce exceeded \$1 million within a 12 month period, that is, where the combined value for all cartel participants of the specific line of commerce affected by the cartel exceeds \$1 million within a 12 month period. 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.

The MOU will also set out that, if the ACCC does refer a matter to the DPP, then the DPP will make an independent assessment of whether to prosecute the case, based on all of the evidence available and on the *Prosecution Policy of the Commonwealth* (the *Prosecution Policy*). In addition, the MOU will specify that in making an independent determination whether to prosecute a cartel offence, the DPP will consider:

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

2.2 “Dishonesty” does not limit the Cartel Offence to “serious cartel conduct”

The proposition in the Press Release that “dishonesty appropriately captures the genuinely criminal nature of serious cartel conduct” implies that dishonesty will limit the Cartel Offence to serious cartel conduct while enabling liability in cases of serious cartel conduct and also sending the message that the conduct is reprehensible. However, the element of dishonesty seems incapable of achieving that aspiration.

²¹ These factors are not entirely parallel to those outlined for the DPP to consider (eg the factor of whether or not the cartel is longstanding).

Assume first that ACO and BCO, small-time competing electrical contractors, agree in secret that BCO will submit the lowest bid of \$10,000 in a tender for rewiring an office and that the bid price is only \$500 more than what the competitive price would have been. Assuming that there are no complicating facts, a jury almost certainly would find this conduct to be “dishonest” under the *Ghosh* direction. This explains why the Criminalisation Proposals depend, not on the concept of dishonesty, but on the \$1 million threshold of affected commerce under the MOU to exclude prosecution in such cases.

Assume secondly that major car parts manufacturers band together and agree to fix prices in an attempt to assist their survival when faced by relentless downwards price pressure by major car manufacturers. The value of the car parts affected over six months by the cartel is \$500 million. The price fixing is serious by any likely measure (and certainly well over the \$1 million value of affected commerce threshold under the MOU). Yet under the *Ghosh* test of dishonesty it is possible that the defendants might obtain an acquittal on the ground that they believed that the price fixing arrangement was necessary for their survival and the welfare of thousands of employees and that the conduct was not dishonest according to the standards of ordinary people. (As discussed further in section 5, the test under the second limb of the *Ghosh* test is subjective. By contrast, the test is subjective *and objective* under section 85(6) of the Trade Practices Act (section 85(6) provides that a court may relieve a person, either wholly or partly, from any liability to a [civil] penalty if it appears to the court that the person has engaged in contravening conduct "honestly and reasonably" and that, having regard to all the circumstances of the court, the person "ought fairly to be excused").

Little point would be served by multiplying examples of the potential over-inclusiveness and under-inclusiveness of the concept of dishonesty. The fundamental difficulty is that dishonesty is a populist notion of moral obloquy, not a principle for determining what type of conduct justifies criminalisation.²² Trying to define a core element of an offence in terms of such a notion of immorality begs the question of the type and degree of harm-causing or risk-taking that warrants criminal prohibition. This is so whether or not we are considering dishonesty as a so-called “positive” element in the definition of an offence (ie the central concept, as in the example of a general offence of fraud or dishonesty) or as a so-called “negative” element (ie a limitation on the scope of an offence otherwise defined in terms of conduct, results or circumstances, as in the example of obtaining money by a false pretence).

Dishonesty also seems miscast in the role of transmitter of the gravity and reprehensibility of cartel conduct. As Harding has noted, dishonesty seems more suggestive of mendacity than conspiratorial distortion of a market.²³

²² See further A Ashworth, *Principles of Criminal Law* (5th ed 2006) ch 2.

²³ Harding, “Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels” (2006) 14 *Critical Criminology* 181 at 198. See also *Ex parte Bennett* [1978] 2 SA 380 (W) (price fixing not an “offence of dishonesty” and hence director not subject to disqualification from office).

2.3 “Intention to obtain a gain” does not limit the Cartel Offence to “serious cartel conduct”

The Cartel Offence would require that a defendant have acted not only dishonestly but also with an *intention to obtain a gain* from a person or class of persons likely to acquire or supply the goods or services to which the cartel relates.²⁴ It is sufficient that the gain is merely intended: no gain need be obtained in fact. Nor is there a requirement that the conduct of the defendant be proximate to obtaining a gain (contrast the proximity rule for the offence of attempting to obtain money by a false pretence).

The requirement of an “intention to obtain a gain” has been criticised by Julie Clarke on the basis that it would allow unmeritorious denials of liability.²⁵

If a corporation or individual engages in conduct that satisfies the other elements of the offence and is dishonest in doing so – that is, it is engaged in with the knowledge that it is wrong to do so – that should be sufficient. In particular, it should be of no consequence from whom conspirators intend to gain. This could lead to all manner of arguments seeking to justify cartel conduct. For example, a corporation, or an individual could engage in blatant price fixing, knowing what they were doing was wrong, but claim that it was done for altruistic purposes, such as ensuring that their business did not fail as a result of ‘cut throat’ competition, thereby rendering their workers unemployed. It is possible to imagine a number of other public benefits that parties to a cartel might *claim* to have intended.

Clarke concludes that the element of “intention to make a gain” is unnecessary to conform to the OECD recommendations on hard-core cartel conduct or with international best practice, unduly complicates the Cartel Offence, and should be excised from the definition of the Cartel Offence. However, the examples given in the extract above do not seem apposite because they are situations where there would be an intention to make a pecuniary or non-pecuniary gain *for another person* and hence would be subject to the application of the Cartel Offence.

Does the requirement of an “intention to obtain a gain” limit the scope of the Cartel Offence to any significant extent? At first sight, the requirement seems almost trivial given that the gain intended by a defendant may be a trivial amount (eg, \$1).²⁶ However, Philip Williams has raised the interesting possibility that, in the context of price fixing, the wording “*intention to obtain a gain from a person or class of persons likely to acquire or supply the goods or services to which the cartel relates*” may have more limiting implications than first meets the eye: “[this wording] may mean that the gain by a selling cartel must be at the expense of those to whom they sell and that the gain by a buying cartel must be made at

²⁴ There is no equivalent requirement under section 1 of the Sherman Act or for the cartel offence under the Enterprise Act 2002 (UK) s 188.

²⁵ Clarke, “Criminal Penalties for Contraventions of Part IV of the Trade Practices Act” (2005) 10 Deakin LR 141 at 160-161.

²⁶ Requiring an “intention to deceive” would not cure this weakness. An intention to deceive in itself hardly smacks of egregious conduct. As Ambrose Bierce observed in *The Devil’s Dictionary*, deception is the soul of religion, the essence of commerce, and the bait of courtship.

the expense of those from whom they buy.”²⁷ If so, then in effect there must be an intention to increase bargaining power at the expense of those with whom the cartel deals. As Williams points out, requiring such an intention will exclude liability for the Cartel Offence in four situations where there is no case for imposing liability for price fixing:

- *collaborative agreements entered into to create value:*

A requirement of proof that the agreement among competitors entered into the agreement did so with the intention of increasing their bargaining power at the expense of those with whom they deal would seem to avoid catching agreements that were entered into to create value: it will only catch agreements that were entered into to increase bargaining power at the expense of those with whom the competitors deal.²⁸

- *agreements with no sustained effect on price levels:*

A requirement of proof that the agreement among competitors entered into the agreement did so with the intention of increasing their bargaining power at the expense of those with whom they deal would avoid liability where, as in *Chicago Board of Trade v United States*, 246 US 231 (1918) and *Radio 2UE Sydney Pty Ltd* (1982) 62 FLR 437, (1983) 68 FLR 70, there is no intention to affect price levels; “[t]his inoffensive class of agreements would not be caught by the new cartel offence.”²⁹

- *agreements among members of a network that competes against another network:*

The members of a network (eg a national football code; a credit card network) that competes against another network may agree with each other about pricing and non-pricing issues within their particular network but will not necessarily have any intention to increase their bargaining power:

In cases where networks compete against each other, price-fixing agreements among members of networks are likely to be driven by concerns to prevent free-riding or to redistribute funds among members – so that incentives confronting members of the network are compatible. That is, the pricing agreements are unlikely to be found to be intended to obtain a gain from the persons with whom members of the network deal. Rather, they are intended to enable the network

²⁷ Philip Williams, commentary on my CRMA Workshop paper, at 3-4.

²⁸ Philip Williams, commentary on my CRMA Workshop paper, at 4.

²⁹ Ibid, at 3-4.

better to compete against rival networks – when such competition is ultimately to the benefit of those with whom the networks deal.³⁰

- *agreements between negotiating partners to engage in joint negotiations:*

Williams points to situations where there are large numbers of buyers and sellers who all agree to a joint negotiation, as in *Re VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT 2 and in joint negotiations for IP rights. As he has explained, in this type of situation there is unlikely to be an intention to obtain a gain at the expense of any other party in the joint negotiation where none of the parties are opposed to the negotiation.³¹

An intention to make a gain at the expense of a buyer may also be absent in other situations, including that where competing sellers fix a maximum price.³²

The limitation elucidated by Williams seems well worth adoption. Indeed, arguably it should also apply to the civil per se prohibition against price fixing. If so, an intention to increase bargaining power and thereby gain at the expense of a buyer or seller would not be a definitional element that would distinguish criminal from civil liability.³³

Worthwhile as it would be to require an intention to increase bargaining power at the expense of those with whom the cartel deals, there will still be situations where the parties do intend to increase their bargaining power through collusion but where the gain to be made from the buyers or sellers on the other side of the deal is low in value.

2.4 The Cartel Offence will define cartel conduct more narrowly than the per se prohibitions against price fixing and exclusionary provisions under the Trade Practices Act but the Cartel Offence is to be a per se offence and will not require the actual or likely causing of serious harm

The definition of cartel conduct in the Cartel Offence is to be narrower in some respects than the definitions of price fixing and exclusionary provisions for the per se prohibitions under the Trade Practices Act.

The concept of “bid-rigging” is much narrower than price fixing as defined in section 45A(1) of the Trade Practices Act. However, “price fixing” is broader and it remains to be seen whether price fixing under the Cartel Offence will be defined on all fours with the section 45A(1) definition. It may be that

³⁰ Ibid, at 5.

³¹ Ibid, at 5-6.

³² See further Easterbrook, “Maximum Price Fixing” (1981) 48 U Chicago LR 886.

³³ Just as the concept of a “naked restraint” does not distinguish civil from criminal liability under section 1 of the Sherman Act.

“controlling” or “maintaining” a price will not be sufficient for price fixing under the Cartel Offence, although that seems unlikely. It may be that the definition will exclude indirect price fixing in the sense of an agreement that controls a price in a downstream market (as in the case brought by the ACCC against the National Australia Bank in 2000 in the credit card interchange fee matter).³⁴ Another possibility is that fixing a maximum price will be excluded.

The concept of “market sharing” is narrower than the prohibition against exclusionary provisions as defined in section 4D, as is that of “output restriction”.

Nonetheless, the Cartel Offence will be a per se prohibition. The Government has not accepted the argument advanced in some submissions to the Dawson Committee that a competition test should apply. For example, the Business Council of Australia submission made the point that a likelihood of severely affecting competition was the quintessence of “hard-core” cartel conduct.³⁵

The most obvious and economically important index of the seriousness of the “cartel” conduct is that the conduct is likely to cause a substantial or very substantial lessening of competition in a market. Descriptions of hard core cartel conduct typically focus on the deliberate intent to raise market prices or to otherwise substantially lessen competition⁹⁵. If criminal sanctions are to be introduced for “hard-core cartel conduct”, the relevant offences should reflect the concern with highly anti-competitive conduct.

Nor is the Cartel Offence to be defined in terms of any requirement of actual or likely serious harm, whether measured in terms of the amount of the loss likely to be caused, the amount of the gain likely to be obtained, or the value of commerce likely to be affected by the commission of the offence.

2.5 The MOU outlined in the Press Release will limit the application of the Cartel Offence but raises issues, especially the under-inclusiveness and over-inclusiveness of the proposed \$1 million value of affected commerce threshold

Threshold of \$1 million value of affected commerce

The Government rejected the ACCC’s initial proposal that the Cartel Offence be limited to large businesses. The Press Release states that: “the offence will ... apply to all businesses, with investigations and prosecutions being targeted at serious cartel conduct that causes large scale or serious economic harm.” However, the MOU is to include a guideline limiting prosecutions to cases where the value of affected commerce exceeds \$1 million. This threshold appears to be based partly on the US

³⁴ Statement of Claim, Federal Court of Australia, No N 948 of 2000. See further *ACCC v CC (NSW) Pty Ltd & Ors* [1999] FCA 954; Nicotra & O’Regan, “Dare To Deem – Does Section 45A Trade Practices Act Prohibit ‘Pro-Competitive’ Price Fixing?” (2001); Tonking, “Competition at Risk? New Forms of Business Cooperation” (2002) 10 *Competition & Consumer Law Journal*.

³⁵ Supplementary Submission to the Review of the Trade Practices Act 1974 and its Administration (2002) at 58.

Sentencing Guidelines under which the value of affected commerce is a significant variable for determining sentences. The US Sentencing Guidelines (see *Federal Sentencing Guideline Manual*) require that fines imposed in respect of specific antitrust law offences (bid rigging, price fixing and market allocation agreements) be related to the “volume of commerce” that was “affected by the violation”. For individuals, fines should be from ‘one to five per cent of the volume of commerce, but not less than US\$20,000’ and for corporations, the base fine is “20 per cent of the volume of affected commerce”. One purpose of specifying a percentage of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss.

This approach avoids the problem identified in the Law Council submission to the Dawson Committee of differentiating between small and large companies where, for example, small and large companies have participated in the same cartel conduct.³⁶

The Press Release states that the value of affected commerce means “the combined value for all cartel participants of the specific line of commerce affected by the cartel”. This reflects the interpretation of the “value of affected commerce” sentencing factor under the US Sentencing Guidelines in *United States v Hayter Oil Co*, 51 F.3d 1265 (1995) where the Sixth Circuit Court of Appeals held that “the volume of commerce attributable to a particular defendant convicted of price-fixing includes all sales of the specific types of goods or services which were made by the defendant or his principal during the period of the conspiracy, without regard to whether individual sales were made at the target price.”³⁷

Clarke has criticised the proposed \$1 million value of affected commerce threshold.³⁸

While the Government has followed these recommendations in relation to the proposed legislation itself, it has undermined them by proposing that the MOU between the DPP and ACCC and the additional ACCC guidelines on the cartel offence, limit the circumstances in which criminal action would be pursued to conduct where a significant amount of commerce was affected, thus ruling out some smaller business agreements which would otherwise fall within the legislation. ... As a consequence, while technically the criminal provisions will apply to all business – big or small – the Government has indirectly imposed a limitation on the application of the offence to only ‘serious cartel conduct that causes large scale or significant economic harm’...

This distinction based on size or scale is unjustified. First, cartel conduct captured by the cartel offence is already ‘serious’, by definition, and the proportionate response to criminal conduct is to apply a criminal penalty. The level of harm caused by the illegal conduct is more

³⁶ Law Council, Submissions to the to the Trade Practices Act Review Committee (2002) 88.

³⁷ See further Squeri, “What Happens Now? Sentencing in Antitrust Cases After Booker” (2005).

³⁸ Clarke, “Criminal Penalties for Contraventions of Part IV of the Trade Practices Act” (2005) 10 Deakin LR 141 at 162.

appropriately a matter for sentencing (as is the case with most criminal offences that can cause varying degrees of harm) and not for determining whether to pursue criminal prosecution in the first place. For example, individuals guilty of speeding are subject to (at least) criminal fines regardless of whether or not they were exceeding the speed limit by 10km or 100km; the fine is simply greater, the higher the speedometer reading. The distinction also presumes that the more value of commerce affected the more damage incurred; in fact smaller cartels may have a profound impact in, for example, smaller country towns where more harm may be caused to certain individual consumers in that town, compared to larger cartels that might inflict more total net damage, but that damage is diffused amongst a wider group of consumers or competitors. Thus, simply because the amount of commerce affected by price fixing may be small does not render the offence less serious for the purpose of defining what is to be criminal; all of these forms of conduct are serious.

The speeding offence analogy in the example above does not seem apposite given that the Cartel Offence is not the only prohibition against cartel conduct but is accompanied by a longstanding civil penalty regime under which heavy penalties can be imposed. Moreover, Clarke does not offer any cogent alternative way of limiting the Cartel Offence to serious conduct.³⁹ However, cartel conduct that has a major adverse effect on competition in a small town but affects commerce to less than the value of \$1 million seems a more understandable concern.

One possible solution would be to limit prosecutions to cases where the specific line of commerce likely to be affected by the cartel represents a minimum percentage (say 20%) or more of the value of sales by all competitors who compete in that specific line of commerce in the relevant geographic market during the period when the specific line of commerce is affected by the cartel or a specified period linked to the time of the alleged offence. In contrast, the proposed threshold of \$1 million value of affected commerce is over-inclusive as well as under-inclusive. It may also be noted that the approach suggested would go some distance toward meeting the concern of the Law Council in its Submission to the Working Party that a monetary threshold may not take account of the multiplier effect of a cartel affecting supply of an essential ingredient or component on very substantial downstream markets.⁴⁰

Degree of harm or danger to competition

The \$1 million value of affected commerce threshold outlined in the Press Release raises the question whether the MOU should set out a test more directly related to the degree of harm or danger to competition. Plainly, the fact that the value of commerce “affected” by the cartel conduct exceeds \$1

³⁹ Prosecutorial discretion is an unreliable alternative; consider eg Wood, “Prosecutorial predicament” AFR 1 June 2006 p 62; Garnaut, “Law targets dole fraud as rich cheats escape the net” SMH 6 February 2006. For an early proposal to limit corporate fraud offences to a minimum level of harm or gain see Fisse, “Directors’ Duties: Honesty and Dishonesty in Corporate Law Reform” (1992) 3 Journal of Banking and Finance Law 151.

⁴⁰ Law Council of Australia, Submission to the Working Party on Penalties for Cartel Behaviour, 12 December 2003, 8.

million does not in itself mean that the impact on competition has been serious. Nor does the fact that collusion has taken place in secret necessarily mean that the collusion is likely to have a serious anti-competitive effect.

As the Business Council of Australia pointed out in its submission to the Dawson Committee, one basic economic index of the seriousness of cartel conduct is whether the conduct has caused or is likely to cause a substantial or very substantial lessening of competition in a market.⁴¹ It may also be noted that the ACCC, in its submission to the Dawson Committee, referred to the international vitamin cartel and other examples as indicating that a “hard-core cartel” as one that has at least the effect or likely effect of severe and pervasive distortion of a market.⁴²

Although the Government has decided to make the Cartel Offence a per se prohibition, a competition test could be made one requirement for the exercise of prosecutorial discretion, on a “quick look” basis.⁴³ This approach would avoid making competition effects an issue in the trial of a cartel offence while imposing a screening process geared directly to limiting prosecutions to cases where the cartel conduct is patently anti-competitive.

Culpability

The Press Release focuses on dishonesty and the effects of cartel conduct but says little about the factor of culpability apart from noting the relevance of recidivism as a factor to be taken into account. Culpability is an important consideration in the exercise of prosecutorial discretion both generally in the criminal law and in the particular context of a cartel offence.

One important consideration is the need to avoid scapegoating individuals who engage in cartel conduct when under extreme pressure to increase sales or in the expectation that their conduct will be welcomed by their superiors and where the easy prosecution route is to proceed against such scapegoats rather than to do the hard yards needed to succeed in a case against higher placed executives.⁴⁴

Another relevant consideration is the relative contribution made by each of the parties to the initiation and furtherance of a cartel.

These and other dimensions of culpability go well beyond the considerations that are relevant when assessing whether or not there is sufficient evidence of an “intention to dishonestly obtain a gain”.

⁴¹ Supplementary Submission to the Review of the Trade Practices Act 1974 and its Administration (2002) 58. See also Law Council, Submissions to the Trade Practices Act Review Committee (2002) 88.

⁴² ACCC, Submission to the Review Committee (June 2002) at 28-29.

⁴³ *California Dental Association v FTC*, 526 US 756 (1999). See further Harpham, Robertson, Williams, “The Competition Law Analysis of Collaborative Structures” (2006) 26-27 (ABLR forthcoming).

⁴⁴ See B Fisse & J Braithwaite, *Corporations, Crime and Accountability* (1993) 182-187.

It is unclear whether or not guidance on these and other issues of culpability is to be included in the MOU. The current Prosecution Policy of the Commonwealth (1990) is brief, contains no detailed treatment of the prosecution of corporations and does not seem to have been updated since 1990. By contrast, culpability is an important factor under the US Sentencing Guidelines and the elements of culpability relevant under the Sentencing Guidelines also serve as a guide to the exercise of prosecutorial discretion.⁴⁵

2.6 Potential limiting effect of: (a) the mental element of the Cartel Offence (apart from the requirement of an intention to dishonestly obtain a gain); and (b) the principle of corporate criminal responsibility applicable to the Cartel Offence

Additional Mental Elements of the Cartel Offence

The Press Release does not canvas the mental element of the Cartel Offence apart from the requirement of an intention to dishonestly obtain a gain. Nor does the Press Release indicate the principle of corporate criminal responsibility that will apply to the Cartel Offence.

The mental element of the Cartel Offence needs to be defined not only for dishonesty but also in relation to the following elements of the Offence (**Additional Mental Elements**):

- the agreement;
- the requirement that two or more competitors be in competition with each other;
- the price fixing, restriction of output, market sharing or bid rigging element of the agreement;
- the anti-competitive nature of the offence (eg an intention to increase bargaining power at the expense of those with whom the cartel deals: see sections 2.3, 6.4);⁴⁶
- the requisite elements of an exemption or defence (eg the joint venture defence under sections 76C and 76D of the Trade Practices Act).

Under the Criminal Code (Cth), an offence consists of physical elements and fault elements.⁴⁷ A physical element of an offence may be conduct, a result of conduct or a circumstance in which conduct, or a result of conduct, occurs. The default mental element for conduct (ie the mental element that will

⁴⁵ See Nanni, Written Testimony to Antitrust Modernization Commission, 3 November 2005. See also US DOJ, Justice Department Guidelines on Prosecution of Corporations (1999).

⁴⁶ Trade Practices Legislation Amendment Act 2006, Schedules 3-4.

⁴⁷ See further Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 7-9; Leader-Elliott, "Elements of Liability in the Commonwealth Criminal Code" (2002) 26 Crim LJ 28.

apply unless a different mental element is specified in the legislation creating an offence) is intention. The default mental element for a result of conduct is recklessness. The default mental element for circumstances is recklessness.

Assume that recklessness is to be the relevant mental element for the Additional Mental Elements of the Cartel Offence.⁴⁸ Recklessness is defined under section 5.4 of the Criminal Code (Cth) as follows:

- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
 - (a) he or she is aware of a substantial risk that the result will occur; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

In the case of price fixing this would mean that an agreement would not exist unless the defendant was aware of a substantial risk of an agreement existing (contrast the objective test adopted by the New Zealand Court of Appeal in *Giltrap City Limited v Commerce Commission* (2003)).⁴⁹ In relation to the likelihood of an agreement resulting in the fixing, controlling or maintaining of a price, a requirement of recklessness would mean that the defendant would have to be aware of a substantial risk that the agreement would result in the fixing, controlling or maintaining of a price (contrast the objective test that now applies under section 45A(1)).⁵⁰

⁴⁸ A contract, arrangement or understanding may be characterised as a conduct element (with intention as the default element) rather than as a circumstance (with reckless as a fault element) where the contract, arrangement or understanding is described in terms of conduct (eg arriving at an understanding). See *R v Saengsai-Or* (2004) 147 A Crim R 172.

⁴⁹ “The existence of the necessary consensus is therefore to be judged by reference to what reasonable people would infer from the conduct of the person whose participation in the consensus is in issue.” See further Guirguis, “29 out of 69: Proving an ‘Arrangement or Understanding’ Relying on Indirect Evidence” (2006) Law Council trade practices workshop, July 2006.

⁵⁰ *ACCC v Pauls Ltd* [2002] FCA 1586 at [104].

Corporate criminal responsibility for the Cartel Offence

The Criminal Code (Cth) prescribes how fault is to be established against a corporation unless a different approach is legislated for an offence. The relevant provisions are:

Section 12.3 – Attribution of Fault to Corporation

12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The means by which such an authorisation or permission may be established include:
 - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
 - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
 - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
 - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section:

board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.

corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

high managerial agent means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

Clearly these requirements for the attribution of fault to a corporation are much narrower and more difficult to establish than vicarious liability under section 84 of the Trade Practices Act.⁵¹ They may be unworkable in the context of the Cartel Offence; see section 6.7.

It may be noted that an “intention dishonestly to obtain a gain” is an ulterior intention, not an intention in relation to “the physical element of an offence”. Accordingly, section 12.3 may not apply to the requirement of an “intention dishonestly to obtain a gain” for the Cartel Offence.⁵² If that is the position, then the attribution of an “intention dishonestly to obtain a gain” to a corporate defendant will depend on the unsatisfactory “directing mind” principle under *Tesco Supermarkets Ltd v Natrass*.⁵³

⁵¹ See the commentary in Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 298-335 and, on corporate dishonesty, 321-325. On corporate criminal liability in the USA, see W Laufer, *Corporate Bodies and Guilty Minds* (2006); Buell, “The Blaming Function of Entity Criminal Liability” (2006) 81 *Indiana LJ* 473.

⁵² For the view that section 12.3 does apply to ulterior intentions see Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 321, relying on s 4(1) of the Criminal Code (s 4(1) applies the Dictionary definitions to terms used in federal offences unless the context or subject matter requires otherwise). But query whether s 4(1) goes that far; s 12.3 should be amended to made the position clear.

⁵³ [1972] AC 153. On the weaknesses of the *Tesco* principle see B Fisse, *Howard's Criminal Law* (5th ed 1990) 601-603.

2.7 Limiting effect of the joint venture defence under sections 76C and 76D

The reach of the Cartel Offence depends partly on the nature and scope of the exemptions that apply. Existing exemptions to the per se prohibitions of price fixing and exclusionary arrangements are to apply as will the joint venture defence under sections 76C and 76D of the Trade Practices Act.⁵⁴

The new joint venture defence under sections 76C and 76D is particularly significant. This defence is not subject to the narrow restrictions that now apply to the joint venture exemption under section 45A(2). Moreover, the concept of “for the purposes of a joint venture” in the defence posits a subjective test and does not define “purposes”, features that give the parties to a wide range of collaborative arrangements the opportunity to avoid liability if they can establish that the “joint venture” did not have the purpose, effect or likely effect of substantially lessening competition in a market.

2.8 Non-definitional indicators of offence seriousness

The extent to which a cartel offence captures the idea of serious cartel conduct depends not only on definitional indicators of offence seriousness but also on the sanctions that can be imposed and the rules of evidence and procedure that apply. The focus of this paper is on definitional markers of offence seriousness but the importance of the type of available sanctions and the rules of evidence and procedure should be kept in mind.

Criminal sanctions

The keynote sanction for the Cartel Offence is jail, the formal deterrent threat of which is accompanied by the informal threat of sexual assault. A jail sentence serves to imprint not only the mark of Cain but also that of Sodom.⁵⁵

The sanctions for corporations do not have quite the same ominous spectre. A conviction for a serious offence does have a stigmatic impact in itself and most corporations are highly sensitive to adverse publicity.⁵⁶ However, the criminal sanctions available are fines that parallel civil penalties and adverse publicity orders.⁵⁷ Non-punitive orders of probation or community service are also possible.⁵⁸ There is no sanction comparable in severity of impact to jail. Obviously any direct analogue of jail would be absurd as a corporate sanction given the drastic spillover effects that incapacitation would have on

⁵⁴ Trade Practices Legislation Amendment Act 2006, Schedules 3-4.

⁵⁵ See Ribstein, “Perils of Criminalizing Agency Costs” (2006) at 6 quoting Allen, “Ken Lay’s Last Evasion” Washington Post, 6 July 2006 at C1: “none of [Lay’s] victims will be able to contemplate that ... he might be spending long nights locked in a cell with a panting tattooed monster named Sumo, a man of strange and constant demands.”

⁵⁶ B Fisse & J Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983).

⁵⁷ TPA s 86D.

⁵⁸ TPA s 86C. See further NSW Law reform Commission, Report 102, Sentencing Corporate Offenders (2003); R Gruner, *Corporate Crime and Sentencing* (1994) ch 12; Fisse, “Community Service as a Sanction against Corporations” [1982] Wisconsin LR 970.

employees, shareholders and the general community.⁵⁹ However, there are other possible sanctions, including the punitive injunction, that could avoid untoward spillover effects and yet internalise within corporations the unwanted nature of serious cartel conduct in a way that fines are incapable of doing (the unwantedness of serious cartel conduct is a fundamental non-pecuniary dimension of such conduct).⁶⁰ This dimension of the criminalisation of cartel conduct may require further consideration. In the meantime, there are various possible combinations of adverse publicity orders, corporate probation and community service orders that could be used by a court when sentencing to make the point that serious cartel conduct is a serious offence and not merely some kind of activity that has a monetary price to be factored into the financial bottom line of a corporation.⁶¹

Evidence and procedure

The Cartel Offence will need to be established by the DPP by proof beyond a reasonable doubt. The criminal standard of proof in itself has a significant limiting effect on the operation of the Offence and, at the level of juror and community perceptions, gives the prohibition the stamp of gravity.

However, it is unclear exactly what powers of investigation will apply in relation to the Cartel Offence.⁶² The Press Release states only that: “[p]roving criminal cartel conduct will involve different procedures in both investigation and prosecution than proving a civil contravention.”

3. QUESTIONABLE ORIGINS OF DISHONESTY AS AN ELEMENT OF THE CARTEL OFFENCE

3.1 Lineage of the element of dishonesty under the Criminalisation Proposals

The element of dishonesty was not recommended by the Dawson Committee who agreed with the introduction of a cartel offence in principle and referred the task of defining the offence back to the Government.⁶³ The ACCC initially did not recommend a requirement of dishonesty but later did so, indicating the need to exclude collaborative arrangements like credit card interchange fee arrangements

⁵⁹ See Fisse, “Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions” (1983) 56 Southern California Law Review 1145.

⁶⁰ See ALRC, Report No 68, *Compliance with the Trade Practices Act 1974* (1994) 10.22-10.24; Fisse, “The Punitive Injunction as a Sanction against Corporations” (1993) working paper, available at www.brentfisse.com; Garrett, “Structural Reform Prosecution” (2006). Contrast the one-dimensional, fine-tuned, analyses propagated by some disciples of law and economics; see eg W P J Wils, *The Optimal Enforcement of EC Antitrust Law* (2002).

⁶¹ Subject to the limiting constraint that probation and community service orders are non-punitive (TPA s 86C).

⁶² See eg Poddar & Leach, “It’s Criminal: The Debate over Penalties for Cartel Conduct” (2003); Clayton Utz, Submission to the Dawson Committee (2002) para 7.5; MacNeil, “Criminal Investigations in Competition Law” [2003] ECLR 151.

⁶³ *Review of the Competition Provisions of the Trade Practices Act* (2003) 155, 161, 163.

from the scope of the offence.⁶⁴ It should be noted that, on Phillip Williams' analysis, the requirement for the Cartel Offence of an "intention to obtain a gain from a person or class of persons likely to acquire or supply the goods or services to which the cartel relates" may mean that there must be an intention to increase bargaining power at the expense of those with whom the cartel deals. If so, the understandable concern of the ACCC about genuine collaborative arrangements is covered by the requirement of an intention to gain and there is no need to rely on the concept of dishonesty in order to exclude such arrangements from the operation of the Cartel Offence.

Several other submissions to the Dawson Committee, including those of the Law Council of Australia and the Business Council of Australia, expressed some support for defining the cartel offence in terms of dishonesty. The later submission of the Law Council to the Working Party supported a requirement of dishonesty "on balance", on the basis that such a requirement "is appropriate as it reflects the morally reprehensible character of conduct for which criminal sanctions are appropriate" and "will assist in excluding technical price fixing which should not be subject to criminal sanctions."⁶⁵ Like the ACCC, the Law Council did not have the benefit of Williams' recent analysis of the way in which, on a sensible interpretation, the requirement of an "intention to obtain a gain from a person or class of persons likely to acquire or supply the goods or services to which the cartel relates" will exclude prominent instances of technical price fixing.

Offences under Part V of the Trade Practices Act do not require dishonesty. A proposal that dishonesty be made an element of these offences was not followed by the Australian Law Reform Commission in Report No 68, *Compliance with the Trade Practices Act* (1994).⁶⁶

The predominant influence on the thinking behind the dishonesty element of the Cartel Offence appears to have been the Enterprise Act 2002 (UK). Section 188 provides in part:

Cartel offence

- (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).
- (2) The arrangements must be ones which, if operating as the parties to the agreement intend, would -
 - (a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service,

⁶⁴ *Review of the Competition Provisions of the Trade Practices Act* (2003) 155. I have been unable to locate a copy of the later ACCC submission which does not seem to be on the Treasury website with other submissions to the Dawson Review.

⁶⁵ Law Council of Australia, Submission to the Working Party on Penalties for Cartel Behaviour, 12 December 2003, 10.

⁶⁶ See ch 9.

- (b) limit or prevent supply by A in the United Kingdom of a product or service,
- (c) limit or prevent production by A in the United Kingdom of a product,
- (d) divide between A and B the supply in the United Kingdom of a product or service to a customer or customers, divide between A and B customers for the supply in the United Kingdom of a product or service, or
- (e) be bid-rigging arrangements.

Section 188 does not provide for corporate criminal liability⁶⁷ nor does it require an “intention to obtain a gain”. The key similarity is the element of dishonesty.

Considerable publicity has been given to the recent price fixing investigation against British Airways and other airlines⁶⁸ and other investigations are said to be in progress. My understanding is that OFT has yet to launch a cartel offence prosecution under the Enterprise Act.

3.2 Bloodline analysis of the element of dishonesty under the Enterprise Act 2002 (UK)

The Office of Fair Trading Report, *Proposed Criminalisation of Cartels in the UK*, November 2001 (OFT 365) gives this background to the introduction of the concept of dishonesty into UK competition law:

- 2.5 ... the offence should include a requirement of ‘dishonesty’ and we so recommend. (This approach is covered in paragraph 7.31 of the White Paper.) The advantage of this approach is (a) it signals that the offence is serious and should attract a substantial penalty and (b) it would go a long way to preclude a defence argument that the activity being prosecuted is not reprehensible or that it might have economic benefits or is an activity which might have attracted exemption domestically or under EC law. The possible disadvantage is that some might argue that an offence which depends on an approach of ‘dishonesty’ may be difficult for juries to understand. However, given the context in which hard core cartels take place, we believe that, in most cases, the facts will demonstrate that the parties realised what they were doing was dishonest and was contrary to the law.

⁶⁷ The explanation given in Office of Fair Trading, Report, *Proposed Criminalisation of Cartels in the UK*, November 2001 (OFT 365) at 2.11 is very brief and does not discuss eg the extensive reliance on corporate criminal liability under US antitrust laws. On corporate criminal responsibility in the UK, see C Wells, *Corporations and Criminal Responsibility* (2nd ed 2001).

⁶⁸ “British Airways faces £850 fine over price-fixing claim” Financial Times 23 June 2006.

- 2.6 An alternative way of defining the offence so as to exclude activities which would attract exemption under Chapter I or Article 81 is to link the offences explicitly to a contravention of those provisions. The objection to that approach is that it will afford the defence a direct opportunity to argue that the activity in question was one which would have attracted exemption either because it might have economic benefits or for some other reason. We do not believe that it will be possible entirely to preclude the risk of such a defence succeeding however the offence is formulated. But we share the views of the DTI and others that the alternative route of requiring the proof of dishonesty is less likely to run that risk.

The White Paper referred to – the DTI White Paper, *A World Class Competition Regime* (Cm5233), July 2001, says this:

Catching the right people

- 7.27 Most importantly, the offence must catch the right people. *The Government wishes to ensure that the law targets those who set up and maintain the cartel, as well as any senior executives or directors who know about the arrangement and condone or encourage it.*
- 7.28 We have identified two broad approaches to the offence itself, both of which involve setting out on the face of the statute the types of hard-core cartel activities identified above: price-fixing, market sharing and bid-rigging.
- 7.29 The first would make it unlawful for a person to participate in an agreement whose purpose is one or more of the hard-core cartel activities identified above, where the agreement also involves a breach of either Article 81 of the EC Treaty or the equivalent prohibition of the Competition Act 1998 (Chapter I).
- 7.30 This approach maintains a direct link with a breach of Article 81 or Chapter I. However, where there has not been a prior determination of an infringement of those provisions, a court would first have to find that the agreement breached one of them. This could require a lay jury with no competition expertise to consider potentially complex economic arguments.
- 7.31 The second approach is to remove the direct link to a finding that an undertaking has breached Article 81 or Chapter I. Instead the offence would be defined as the dishonest participation in an agreement which has, as a purpose, one or more of the specified hard-core cartel activities. A jury would need to determine whether a defendant had acted dishonestly. A defendant could use as his defence the claim that he honestly believed he was acting in accordance with Article 81 or Chapter I.

- 7.32 This approach avoids the real difficulties involved in requiring a prior determination regarding a breach of either Article 81 or Chapter I by a jury. It would also remove the possibility of a defendant's employer frustrating court proceedings by notifying an agreement to the European Commission, although this option would, in any case, only be available until EC modernisation. The disadvantage of the approach is that the direct link with a breach of these provisions is lost.
- 7.33 To be effective, it is critical that the offence is defined in a way which is both clear and easy for business and the courts to understand. It must also be actively applied so that its deterrent effect is genuinely felt. *The Government recognises that defining the offence is a complex task and would welcome views on the proposals outlined above and other possible approaches.*

These explanations for introducing dishonesty as an element of the cartel offence under the Enterprise Act 2002 (UK) are incomplete and problematic and, if invoked to support reliance on the element of dishonesty in the Cartel Offence, lack any apparent cogency:⁶⁹

- The Office of Fair Trading Report, *Proposed Criminalisation of Cartels in the UK*, states that “[the approach of making dishonesty a requirement of the cartel offence] “is covered in paragraph 7.31 of the White Paper.” However, paragraph 7.31 of the White Paper (extracted above) is merely a summary note about the element of dishonesty. It fails to identify or address any of the significant difficulties that arise.
- One telling feature of the Report is that dishonesty was seen as a way of preventing defendants from arguing in a jury trial that they had not committed a breach of UK or EU competition laws because, for example, the conduct was subject to an exemption. This approach seems misguided. First, there is little or no merit in substituting the ill-defined notion of dishonesty for the relatively precise liability rules that apply to civil per se prohibitions and the exemptions to them. (The Criminalisation Proposals take the very different approach of allowing a defendant to rely on any exemptions that apply to the per se prohibitions against price fixing and exclusionary arrangements.) Secondly, it is difficult to understand how the element of dishonesty would prevent a defendant from arguing that conduct in compliance with a civil per se prohibitions was not dishonest

⁶⁹ The parliamentary debates add little; see *House of Commons Standing Committee*, 18 April 2002 cols 135-140; *House of Commons Standing Committee*, 23 April 2002 cols 170-171; *House of Lords*, 18 July 2002 col 1539; *House of Lords*, 15 October 2002 cols 835-838; *House of Lords* 28 October 2002 cols 65-71. See further Harding, “Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels” (2006) 14 *Critical Criminology* 181 at 201 where the view is expressed that the cartel offence in the UK appear to have “a rhetorical rather than actual character” and that “this may be less a matter of concern for the US Department of Justice if the formal act of criminalisation abroad serves its own national enforcement needs”. Those enforcement needs are partly served by a cartel offence given that extradition to the US is not possible unless the conduct for which extradition is sought is also an offence in the requested state.

according to the standards of ordinary people. Here the Report is at odds with the statement in paragraph 7.31 of the White Paper that: “A defendant could use as his defence the claim that he honestly believed he was acting in accordance with Article 81 or Chapter I.” Thirdly, even in the case of conduct yet to be exempted but which the defendant believed to be likely to become exempted, it is difficult to understand how the element of dishonesty would prevent the defendant from arguing that he or she did not know that the conduct was dishonest according to the standards of ordinary people. Indeed, as discussed in section 5.3 of this paper, the subjective limb of the element of dishonesty gives defendants much more latitude to deny liability than is the case where liability depends on the legal definition of civil per se prohibitions and related exemptions.

- The Report dismisses the difficulties that may arise in jury trials by saying that “given the context in which hard core cartels take place, we believe that, in most cases, the facts will demonstrate that the parties realised what they were doing was dishonest and was contrary to the law.”⁷⁰ This proposition begs the question of how the difficulties are to be managed in less than clear-cut cases of blatantly serious cartel conduct and seems disingenuous.

3.3 The concept of dishonesty has not been adopted for cartel offences in other jurisdictions

The Press Release makes this representation:

To ensure consistency with international best practice, the legislated definition of cartel conduct in Australia under both the civil and criminal regimes will accord with the OECD’s definition of serious cartel conduct, that is, agreements, practices or arrangements that fix prices, rig bids, restrict output or establish quotas and share or divide markets by allocating customers, suppliers, territories or lines of commerce. In 1998, the OECD recommended members ensure their competition laws halt and deter these cartel activities.

This representation does not disclose the fact that dishonesty is not an element of cartel offences in jurisdictions other than the UK. For example, dishonesty is not required under the definition of cartel offences in the USA, Canada, Japan, Korea, France, Germany, or Ireland.⁷¹

⁷⁰ Para 2.5.

⁷¹ See Massey, “Criminal Sanctions for Competition Law: A Review of Irish Experience” (2004) 1 Competition LR 23. For an overview of the cartel laws in 31 jurisdictions see Global Competition Review, *Cartel Regulation 2006*.

3.4 Dishonesty is not mentioned in the OECD or ICN definitions of serious cartel conduct

The concept of dishonesty is not mentioned in OECD Report, *Fighting Hard-Core Cartels* (2002), the Dead Sea Scroll in the literature on combating serious cartel conduct. Nor is dishonesty mentioned by the ICN Working Group on Cartels in its Report, *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties* (2005).

4. DISHONESTY – “STANDARDS OF ORDINARY PEOPLE”

4.1 The *Ghosh* test as adopted under the Commonwealth Criminal Code

The Press Release advances this justification for introducing the concept of dishonesty into Australian competition law:

The Dawson Review put the view that using an element of dishonesty to identify criminal cartel conduct could cause difficulties to a jury. However, dishonesty is an established concept in Australian criminal law and is widely used in corporations and fraud offences.

The starting point is the two limb test for dishonesty established in *Ghosh*, as elaborated by Lane LJ:⁷²

... a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.

The *Ghosh* test was discussed by the High Court Australia in *Peters v The Queen* (1998) 192 CLR 431⁷³ in the context of the offence of conspiracy to defraud the Commonwealth. Toohey and Gaudron JJ, with whom Kirby J agreed, held that a different test applied, and reformulated the test partly in terms of an

⁷² [1982] 2 All ER 689 at 696.

⁷³ See also *Macleod v The Queen* (2003) 214 CLR 230.

“ordinary decent person” test.⁷⁴ It is unnecessary to revisit the judgments in *Peters v The Queen* given that the *Ghosh* test has since been codified under the Criminal Code (Cth) and that the Criminal Code approach is to apply to the Cartel Offence.

The relevant provisions under Chapter 7 of the Criminal Code (Cth) are:

130.3 Dishonesty

For the purposes of this Chapter, *dishonest* means:

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

130.4 Determination of dishonesty to be a matter for the trier of fact

In a prosecution for an offence against this Chapter, the determination of dishonesty is a matter for the trier of fact.

4.2 “Standards of ordinary people” in offences against property

Although dishonesty has been codified under the Criminal Code Act (Cth)⁷⁵ and is widely used as an element in the definition of fraud offences and offences by corporate officers under the Corporations Act, the concept has a chequered history.⁷⁶

Law Commission Consultation Paper No 155 (1999)

The UK Law Commission in Consultation Paper No 155, *Legislating the Criminal Code: Fraud and Deception* (1999) provides a succinct critique of the main problems posed by the *Ghosh* test.

⁷⁴ For a detailed critique of *Peters* see Steel, “The Appropriate Test for Dishonesty” (2000) 24 Criminal LJ 46.

⁷⁵ For the history see Goode, “The Future of Fraud Control” (2000).

⁷⁶ See A Halpin, *Definition in the Criminal Law* (2004) 150-166; A Ashworth, *Principles of Criminal Law* (5th ed 2006) 405-9; Griew, “Dishonesty: The Objections to Feely and Ghosh” [1985] Criminal Law Review 341; Elliott, “Dishonesty in Theft: A Dispensable Concept” [1982] Criminal Law Review 395; Elliott, “Directors’ Theft and Dishonesty” [1991] Criminal Law Review 732; Ormerod, “A Bit of a Con? The Law Commission’s Consultation Paper on Fraud” [1999] Criminal Law Review 789; Steel, “The Appropriate Test for Dishonesty” (2000) 24 Criminal LJ 46.

The Law Commission comments first on the unusual nature of *Ghosh* dishonesty as an element of an offence:

An unusual kind of requirement

- 5.11 The *Ghosh* approach requires fact-finders to set a moral standard of honesty and determine whether the defendant's conduct falls short of that standard. The argument in *Ghosh* (which first laid down the approach developed in *Ghosh*) is that this is a purely semantic enquiry: "dishonestly" is an ordinary English word, and, as presumably competent users of English, fact-finders can be expected to know what it means. But it is also a moral enquiry, and requires the making of a moral judgment. To say that something is dishonest is to characterise the existing facts, not add another fact. This, we believe, is an unusual kind of requirement in English criminal law. Traditionally, offences consist of objectively defined conduct (or circumstances, or events) and mental states (or other fault elements, such as negligence), subject to objectively defined circumstances of justification or excuse (such as self-defence or duress). In general the fact-finders' task is to determine whether the defendant's conduct falls within the legal definition of the offence, not whether they think it sufficiently blameworthy to be an offence. A requirement that the conduct in question fall short of an undefined moral standard is out of keeping with this approach.
- 5.12 It is true that fact-finders often have to make judgments on matters of degree. Driving, for instance, becomes an offence if it falls below a certain level of competence or diligence. But dangerous driving is defined by statute in terms which render it a factual question, and the same is true of careless driving as a matter of case law. Thus, in these offences, the role of the fact-finders is to determine whether the defendant's conduct falls below a legally defined standard. They are not required to decide whether conduct which does fall below that standard is sufficiently blameworthy to be criminal.
- 5.13 A closer analogy to *Ghosh* dishonesty, perhaps, is gross negligence manslaughter. The law requires the jury to determine whether the defendant's conduct was careless enough to be criminal, but does not tell them how careless it needs to be. It therefore requires the jury not just to apply a standard, but also to set it. Arguably this is no different in principle from the kind of enquiry required by *Ghosh*. But in one sense it is more objective, because the riskiness of a person's conduct is more quantifiable than its dishonesty. Given enough facts, risk can be mathematically assessed: the relative dangerousness of different forms of conduct is at bottom a question of fact. A 30% risk of death is greater than a 10% risk. In the case of dishonesty, however, even this degree of objectivity does not exist. Dishonesty is not quantifiable, even in theory. The relative blameworthiness of (say) minor theft from an employer and failure to disclose part of one's income to the tax authorities is entirely a matter of opinion. The fact-finders are

required not merely to place the defendant's conduct at an appropriate point on the scale, but to construct their own scale.

- 5.14 We suggest, therefore, that the task allocated to juries and magistrates by the *Ghosh* test is a very unusual one. It is as if juries were directed, in relation to the defence of self-defence: "It is for you to decide whether the defendant's response to the force used by the victim was justified or not. 'Justified' is an ordinary English word, which you must define and apply for yourselves." Some juries would apply the same standard that the law now applies. Others might adopt a pacifist position and say that no force was justified, even in self-protection. Others again might consider that, having started the fight, the victim deserved a good beating. And there would be no way of rationally adjudicating the competing moral outlooks revealed. [Footnotes omitted]

The Law Commission then criticises the *Ghosh* test on the basis that the test leads to inconsistency:

Inconsistency

- 5.15 That like circumstances should be treated alike is fundamental to fairness and the rule of law. The result of our analysis of dishonesty is that the use made of the concept in the law must result in endemic inconsistency.
- 5.16 Central to *Feely* and *Ghosh* is the insistence that "dishonesty" is an ordinary English word. But even if it is an ordinary word in the English language, there is no guarantee that all speakers of the language will agree as to its application, particularly in marginal cases. As Professor Griew pointed out, "Even judges, a relatively homogeneous group of uniformly high linguistic competence, have been known to differ on the application of the epithet 'dishonest' in a marginal case". Individuals can reasonably differ in the application of a word. The point of the paraphrase provided by a definition is to bring users of the word together. Where the law defines a term, the process goes further: the meaning is, for the purposes of the provision, prescribed. Thereafter, any divergence in application from the prescribed meaning is an error. But fact-finders considering dishonesty are given no such assistance.
- 5.17 The test in *Ghosh* provides a way for fact-finders to apply the "ordinary standards of reasonable and honest people", presumably by applying their common understanding of the word. But this amounts to an appeal to a unified conception of honesty which we do not think is workable in modern society. We live in a heterodox and plural society which juries (and to a lesser extent magistrates) presumably replicate. To assume that there is a single community norm or standard of dishonesty, discernible by twelve (or even ten) randomly selected people of any age between 18 and 65, and of widely varied class, cultural, educational, racial and religious backgrounds, is unrealistic. How juries cope

with these problems we cannot tell, given the prohibition on research into jury discussions. It seems inconceivable, however, that different juries do not come to different decisions on essentially similar facts. These are not perverse verdicts, because individually they are the result of the jury correctly applying the law. Such verdicts have been described as “anarchic”, because they are the result of the jury being asked “a question of moral estimation without guidelines”.

5.18 In actually applying the *Ghosh* test, fact-finders may consider matters which, in the case of other offences, would not be matters properly relevant to guilt. These include motive, pressure of circumstances or even good character. It may be objected that these do not, or should not, come within even the most fragmentary sense of “dishonesty”, and that it is therefore improper to take account of them; but the whole point of *Ghosh* is that a matter is relevant to dishonesty if ordinary people think it is. No perverse verdict on the issue of honesty is possible. The jury have complete control of the question. The word does not mean what it ordinarily means. It means what a jury decides it means

5.19 The same point may be taken further in respect of mens rea. A criminal statute traditionally spells out the mental element required, and the jury are directed (or the magistrates advised) that they must be sure that the defendant acted with the requisite state of mind. In the context of a general dishonesty offence, the factfinders would have to find some blameworthy mental element, but could not be told what it should be. One jury might be satisfied that recklessness as to the truth or otherwise of a representation amounted to dishonesty, whereas in another identical case the jury may require an intention to mislead. Further, some members of the jury or bench may consider recklessness sufficient, while others require intention. If the law is as a general rule right to require the specification of mental elements with some exactitude, then a failure to do so is wrong in principle. A requirement of dishonesty is not an adequate substitute.
[Footnotes omitted]

The provisional view reached by the Law Commission in the Consultation Paper was that:

.. juries and magistrates should not be asked to set a moral standard on which criminal liability essentially depends. As a general rule, the law should say what is forbidden, and that should be informed by moral insights. A jury or magistrates should then be asked to apply the law by coming to factual conclusions, not moral ones.

The Law Commission, in its subsequent report, decided to retain the concept of dishonesty, partly because it disagreed with the view that the *Ghosh* test caused problems in practice and partly because it did not wish to rock the boat.⁷⁷

The fact that *Ghosh* dishonesty leaves open a possibility of variance between cases with essentially similar facts is, in our judgment, a theoretical risk. Many years after its adoption, the *Ghosh* test remains, in practice, unproblematic. We also recognise the fact that the concept of dishonesty is now required in a very large number of criminal cases, so to reject it at this stage would have a far-reaching effect on the criminal justice system.

4.3 “Standards of ordinary people” in the context of the Cartel Offence

It may be argued that Australia has lived with the concept in dishonesty in fraud offences and offences by corporate officers under the Corporations Act and that this experience shows that the concept is workable. This appeal to experience is far from convincing because it does not answer the particular concerns expressed by the Law Commission in Consultation Paper No 155 and by commentators.⁷⁸ However, the main weakness of any such argument is that, whatever the rhetoric used in an attempt to equate “serious cartel conduct” with theft or fraud, a wide range of cartel cases bear no direct factual resemblance to mainstream cases of fraud or offences by corporate officers under the Corporations Act. As amplified below, the particular circumstances of cartel cases are likely to test the workability of the concept of dishonesty in new ways, especially given that the Cartel Offence is to be tried by a jury.⁷⁹

In the lead up to the decision in *Ghosh* in England, Edward Griew made the point that it is pointless or confusing to ask jurors what the standards of ordinary people are where they are not familiar with the subject matter:⁸⁰

The *Feely* question is in any case unsuitable where the context of the case is a specialised one, involving intricate financial activities or dealings in a specialised market. It is neither reasonable nor rational to expect ordinary people to judge as ‘dishonest’ or ‘not dishonest’ conduct of which, for want of relevant experience, they cannot appreciate the contextual flavour. Their

⁷⁷ Law Commission, Law Com No 276, *Fraud* (2002) 5.18.

⁷⁸ In my opinion, this is a failing of several commentaries; see eg Clarke, “Criminal Penalties for Contraventions of Part IV of the Trade Practices Act” (2005) 10 Deakin LR 141 at 159-160; Scanlan, “Dishonesty in Corporate Offences: A Need for Reform?” (2002) 23 *The Company Lawyer* 114 at 119.

⁷⁹ The difficulties faced by juries are explored extensively in MacCulloch, “Honesty, Morality and the Cartel Offence” (2006). On the extent to which jury trial is required under section 80 of the Commonwealth Constitution, see Chesterman, “Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy” (1999) 62 *Law & Contemporary Problems* 69 at 75-77.

⁸⁰ Griew, “Dishonesty: The Objections to Feely and Ghosh” [1985] *Criminal Law Review* 341 at 345.

answer to the *Feely* question ought sometimes to be that ordinary people have no standards in relation to the conduct in question.⁸¹

Oliver Black has amplified the same point in the particular context of cartel conduct:⁸²

The problem of community norms is especially acute here: most people have not reflected on the norms to apply to cartels and, in so far as they have, opinions are likely to differ as to the dishonesty of, say, dividing markets: few people, perhaps, will see anything dishonest in the practice where the purpose is to preserve jobs, and a vigorous entrepreneur may see nothing dishonest in it in any circumstances. Also, to the extent that community norms of dishonesty exist, they change at both the individual and the governmental level: a couple of generations ago, practices falling within sections 188 and 189 were officially encouraged in the interest of planning and the elimination of wasteful duplication. It appears that one aim of the government in creating the cartel offence was precisely to shift public opinion as to the heinousness of hard-core cartels. [Footnotes omitted]

In similar vein, the standards of ordinary people may tend to oscillate out of control when juries are reminded by defence counsel that export cartels are lawful if notified in advance⁸³ or that price fixing can be authorised.

Bill Reid has suggested that cartel regulation in Australia is moving towards a “schizophrenic approach” in the context of collective bargaining arrangements.⁸⁴

Included in the *Trade Practices Legislation Amendment Bill (No 1) 2005*, there is provision for the notification of “collective bargaining” arrangements among businesses engaged in commerce of less than \$3 million in value. If the practice of notification becomes common among smaller businesses, there will, I think, be less moral abhorrence of cartel behaviour in Australian corporate life. It will be difficult for a business manager to turn his back on a potentially collusive strategy among his competitors (tacit or otherwise), if the potato suppliers, say, with whom he deals day to day, are openly engaged in a cartel. [Footnote omitted]

⁸¹ See also Ribstein, “Perils of Criminalizing Agency Costs” (2006) at 5 (“When people have to make judgments that transcend their experience and knowledge, they may engage in heuristic shortcuts. They might be influenced by, for example, resentment of the rich and powerful.”)

⁸² O Black, *Conceptual Foundations of Antitrust* (2005) 128. See also MacCulloch, “The Cartel Offence and the Criminalisation of United Kingdom Competition Law” [2003] *Journal of Business Law* 616; Peretz “Go Directly to Jail: Losing Badly in ‘Monopoly’” (New Law Journal 24 January 2003; Pape “Socio-Cultural Differences and International Competition Law” (1999) 5 *European LJ* 438. The evolution of US antitrust enforcement is also instructive: see eg Waller, “The Antitrust Legacy of Thurman Arnold” (2004) 78 *St John’s LR* 569.

⁸³ TPA s 51(2)(6). This is a highly questionable exemption; see Rennie, “Export Exemptions and the Australia-United States Free Trade Agreement: Legitimate Domestic Protections or Self-Defeating Protectionism” [2006] *International Trade LR* 21; Victor, “Export Cartels: An Idea Whose Time Has Passed” (1992) 60 *Antitrust LJ* 571. Shipping conferences are another possible source of bewilderment about “dishonesty”.

⁸⁴ “Cartels - Criminal Sanctions and Immunity Policy”, *Competition Law Conference*, Sydney, 12 November 2005.

There are various possible sources of moral ambiguity in the context of white collar crime generally, including these:⁸⁵

- complexity of underlying activity and/or difficulty of defining harms and identifying victims;⁸⁶
- diffusion of responsibility in large organisations;
- conflation of liability for inchoate and completed offences;⁸⁷
- value of surrounding legitimate conduct; and
- legislative framework and signals (eg existence of civil as well as criminal prohibitions and extensive or predominant reliance on civil prohibitions).⁸⁸

These factors are not present or are much less significant in the paradigm case of theft. Such factors may influence a jury's assessment of the standards of ordinary people in some cartel cases. For example, in the heavy electrical equipment price fixing conspiracies in the USA in the late 1950s and early 1960s, those who went to jail in the larger companies were middle managers rather than the superiors who had exerted pressure on them to get business and who may have condoned the price fixing activities that occurred over many years. Even if CEOs such as Ralph Cordiner of GE had been unaware of the bid rigging, the middle managers had acted in accordance with the law of anticipated reactions in administrative behaviour:⁸⁹ employees act in the way anticipated as being consistent with the expected reactions of their superiors.⁹⁰ The middle managers and their companies were under considerable economic pressure to survive. Was the middle managers' conduct "dishonest according to the standards of ordinary people"? The middle managers interviewed after the electrical equipment

⁸⁵ For a comprehensive overview, see Greene, "Moral Ambiguity in White Collar Criminal Law" (2004) *Notre Dame Journal of Law, Ethics & Public Policy* 501. See also Kadish, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" (1963) 30 *Univ of Chicago LR* 423; Ball & Friedman, "The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View" (1965) 17 *Stanford LR* 197.

⁸⁶ This may be an issue in some cases of cartel conduct but blatant cartel conduct is typically simple and does not involve nearly the same factual complexity as many corporate fraud trials: see MacCulloch, "Honesty, Morality and the Cartel Offence" (2006). On the limited ability of consumers to sense and respond to price fixing see Round, "Consumer Protection: At the Mercy of the Market for Damages" (2003) 10 *CCLJ* 231.

⁸⁷ The Cartel Offence and the per se prohibitions under Part IV are inchoate prohibitions in the sense that the arrangement may be preliminary and need not cause actual harm to competition. Additionally, as in the case of the offence of conspiracy, there is no proximity rule of the kind that applies to the offence of attempt.

⁸⁸ See generally Coffee, "Paradigms Lost: The Blurring of the Criminal and Civil Law Models -- And What Can Be Done About It" (1992) 101 *Yale Law Journal* 1875; Coffee, "Does 'Unlawful' Mean 'Criminal'? Reflections on the Disappearing Tort/Crime Distinction in American Law" (1991) 71 *Boston Univ LR* 193.

⁸⁹ See H Simon, *Administrative Behavior* (1957) 130.

⁹⁰ RA Smith, *Corporations In Crisis* (1966) chs 5-6; B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983) ch 16.

conspiracy prosecutions typically saw their conduct as “illegal but not criminal” or as an understandable effort to stabilise the industry and thereby cover costs rather than to gouge consumers.⁹¹

Christine Parker has interviewed a sample of Australian business executives about their perceptions of the ACCC and its enforcement policy and practice. One interviewee was Robert Wilson, the managing director of Wilson Transformer Company, one of the transformer companies caught up in the transformer company cartel that led to substantial civil penalties against the companies and their senior executives. What he said when interviewed is an interesting cameo of the motivational complexity that can arise in cartels which, to the uninformed outsider, may seem blatant:⁹²

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

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

⁹¹ Geis, “The Heavy Electrical Equipment Cases of 1961” in G Geis & R Meier, eds, *White Collar Crime* (1977) 117-132; MacCulloch, “Honesty, Morality and the Cartel Offence” (2006).

⁹² Parker, “The ‘Compliance Trap’: The Moral Message in Responsive Regulatory Enforcement” (2006) 40 *Law & Society Rev* 591 at 607. See also C Harding and J Joshua, *Regulating Cartels in Europe: A Study of the Legal Control of Delinquency* (2003) 255; R Jackall, *Moral Mazes: The World of Corporate Managers* (1988); Simpson, “The Decomposition of Antitrust: Testing a Multi-level, Longitudinal Model of Profit-Squeeze” (1986) 51 *American Sociological Rev* 859; Simpson, “Cycles of Illegality: Antitrust Violations in Corporate America” (1987) 65 *Social Forces* 943.

4.4 “Standards of ordinary people” as a populist moral dimension superimposed on the law and economics of cartel conduct

According to the Press Release:

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.⁹³

Unfortunately, transplanting dishonesty into the Trade Practices Act prohibitions against price fixing and other cartel conduct would be to introduce a populist moral dimension that deviates from the law and economics of cartel conduct.⁹⁴ It is axiomatic that the main object of competition law is the promotion of workable competition, not the elimination of immoral conduct.⁹⁵

The element of dishonesty in the Cartel Offence will require anyone concerned in the application of the Offence to analyse the relevant conduct in terms of the standards of ordinary people and whether or not the defendant knew that the conduct was dishonest according to those standards. This is a very different frame of reference from that required to focus on whether: (a) the parties are competitors; (b) the parties have entered into or given effect to an agreement, arrangement or understanding between the competitors; (c) the agreement, arrangement or understanding relates to price fixing, bid rigging, market sharing or restricting output or setting quotas; and d) the parties have acted with the type of fault required by the mental element of the per se prohibition.⁹⁶

The populist notion of dishonesty is likely to promote simplistic or misguided judgments about competition and anti-competitive conduct or unguided and uncorrected interpretations of the folklore of capitalism. In complete contrast, economically well-informed competition laws and legal processes serve to avoid or counteract loose or delusional thinking, as explained by Don Robertson:⁹⁷

⁹³ This is not to disagree with the moral dimension of economics developed by A Etzioni, *The Moral Dimension: Towards a New Economics* (1988) and others. The concept of dishonesty as a definitional element of a cartel offence is far removed from Etzioni's moral dimensions of economics.

⁹⁴ This seems very far removed from the focus on the economic effects of cartels in the application of EU competition law (see eg C Harding and J Joshua, *Regulating Cartels in Europe: A Study of the Legal Control of Delinquency* (2003) 59-60), or that in US antitrust law (see eg Bajari & Summers, “Detecting Collusion in Procurement Auctions” (2002) 70 *Antitrust LJ* 143).

⁹⁵ See Philip Williams' commentary on my CRMA Workshop paper, at 1 (referring to Brunt, “Legislation in Search of an Objective” (1965) 41 *Economic Record* 357 (particularly section 3 “Ends and Means); and *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited* (1989) ATPR 40-925.; H Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (2005) (emphasizing repeatedly that antitrust is an economic enterprise not a moral one). See also Baier, “Trust and Antitrust” in *Moral Prejudices: Essays on Ethics* (1994) 95-129.

⁹⁶ Consider also Waller, “The Language of Law and the Language of Business” (2001) 52 *Case Western Reserve LR* 283 (2001).

⁹⁷ Robertson, “Expert Economic Evidence: Challenging the Paradigm” (2003) 11 *TPLJ* 70. On the pivotal role of economics in competition law see further R Posner, *Antitrust Law* (2nd ed 2001); P McNutt, *Law, Economics*

In competition law, economists highlight the deficiencies in intuitive judgments. It is easy, for example, to assume that imposing restrictions on individual parties' freedom to act will lessen competition. Yet the imposition of restrictions is sometimes exactly what is needed to counteract opportunistic behaviour or to give the correct incentives to parties to behave in a competitive fashion. Likewise, some vertical restraints might improve the competitive process, as the High Court has now accepted.

Furthermore, the readiness of the mind to assume that *competition* is harmed if *competitors* are harmed also needs a powerful antidote. With respect to Finklestein J, for example, to define "predatory pricing" (a concept not found in the *Trade Practices Act 1974 (Cth)*) as "no more than a price set at a level designed to eliminate a competitor or keep a competitor from the market" makes such a mistake.

The history of competition laws in the United States and elsewhere is a history of working away from such simplistic judgments. Economic theory helps provide an antidote to simplistic thinking because it forces decision-makers to make decisions on a principled basis. The principles come from the models of economists and the basic logic of the market process that economists identify. This is why the "first principles" approach of Steven Salop, in articulating the logic of antitrust law, is certainly helpful but nothing new. It articulates nothing more than the underlying logic of the theory of the market.

Economists' thought experiments (hypotheticals, counterfactuals) are all intended to highlight the unintended consequences of judgments made on the basis that there are pure facts that fall from the sky unaided by a framework of interpretation. Such a failing is not unique to lawyers and judges, and no lawyer or judge is immune from it.

These tools are also familiar tools of lawyers. Economists are more complements than substitutes in the role of challenger of simplistic or intuitive judgments. However, legal history does show how lawyers challenge established patterns of thought. They probe and ask judges to reconsider what might seem to be "obvious" conclusions. Judges and lawyers each have the failings and biases of the average person. We all need to have our preconceptions challenged. Lawyers' ability to challenge the status quo by highlighting the consequences of the dominant

and Antitrust: Towards a New Perspective (2005); K Hylton, *Antitrust Law: Economic Theory & Common Law Evolution* (2003); M Motta, *Competition Policy: Theory and Practice* (2004); French, "Judicial Approaches to Economic Analysis in Australia" in DK Round (ed), *The Australian Trade Practices Act 1974: Proscriptions and Prescriptions for a More Competitive Economy* (1994); Robertson, "Foundations of a Principled Approach to the Regulation of Markets: Rationality and the Assimilation of Economics by the Law", Competition Law Conference, 17 May 2003; Harpham, Robertson & Williams, "The Competition Law Analysis of Collaborative Structures" (2006) ABLR; Jacobs, "An Essay on the Normative Foundations of Antitrust Economics" (1995) 74 North Carolina LR 219, 227-40; Baker, "Recent Developments in Economics that Challenge Chicago School Views" (1989) 58 Antitrust LJ 645; Williamson, "Economics and Antitrust Enforcement: Transition Years" (2003) (Spring) Antitrust Magazine 61; Williamson, "Delimiting Antitrust" (1987) 76 Georgetown LJ 271, 302; Page, "The Ideological Origins and Evolution of Antitrust Law (2005); Evans, "How Economists Can Help Courts Design Competition Rules: An EU and US Perspective" (2005) 28(1) World Competition 93.

social paradigm is one of the few social justifications for the legal profession. [Footnotes omitted]

The dishonesty movement under the Criminalisation Proposals sets the clock back, without any daylight saving.

5. DISHONESTY – KNOWLEDGE THAT THE CONDUCT IS DISHONEST ACCORDING TO THE STANDARDS OF ORDINARY PEOPLE

5.1 The subjective test of dishonesty under the *Ghosh* test adopted under the Commonwealth Criminal Code

Under section 130.3 of the Criminal Code (Cth), *dishonest* means:

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

Cartels of the type that occurred in the international vitamins and lysine cartels are most unlikely to give juries pause under the *Ghosh* test of dishonesty adopted by the Criminal Code.⁹⁸ However, there will be less egregious cases of cartel conduct where the ACCC and the DPP may be minded to prosecute and where the limits and possible vulnerabilities of *the Ghosh* test will be vigorously tested.⁹⁹ In particular, the *Ghosh* test will be vigorously tested by defendants who seek to exploit the vulnerability of the subjective limb of the *Ghosh* test by denying liability on the basis that they entertained an honest mistake of law, or that they entertained some other kind of subjective belief inconsistent with the prosecution case that they knew their conduct to be dishonest according to the standards of ordinary people. Here it should be remembered that the persuasive burden of proof lies on the prosecution and that a defendant is entitled to an acquittal where the jury has a reasonable doubt.

The difficulties that will arise in applying the *Ghosh* test are unlikely to be avoided by pretending that dishonesty reduces to simple indicators of the kind noted in the Press Release:

Indicators of dishonesty include deception (such as lies or misleading statements), making or

⁹⁸ Consider eg Connor, “‘Our Customers Are Our Enemies’: The Lysine Cartel of 1992-1995” (2001) 18 Review of Industrial Economics 5.

⁹⁹ *R v Saunders* [1996] 1 Cr App Rep 463 is an example in the context of fraud by directors. Saunders’ conviction was upheld on appeal. The jury did not accept his story that he was unaware of certain indemnities and success fees that had been entered into in a takeover battle. However, the case illustrates the potential difficulty of applying the standards of ordinary people in a context where such indemnities and success fees were quite common in takeover battles. See A Halpin, *Definition in the Criminal Law* (2004) 159-160.

relying upon representations or promises that are known to be false or which would not be carried out, concealing facts that there is a duty to disclose, and engaging in conduct that the defendant knows they have no right to engage in.

The above statement misstates the *Ghosh* test as adopted under the Criminal Code (Cth). Deception in itself is not enough to satisfy the *Ghosh* test, nor is making a false representation or concealing a material fact. It would also be inaccurate and misleading to ask a jury whether the defendant knew that he had no *right* to engage in the conduct – the *Ghosh* test is not framed in terms of “rights”, whether legal or moral. Another reductionist error would be to treat an intention to obtain a gain as sufficient to amount to dishonesty; plainly it is not.¹⁰⁰

It should be noted that the *Ghosh* test, as adopted under the Criminal Code (Cth), is whether the defendant *knew* that the cartel conduct alleged was dishonest according to standards of ordinary people. The test is not whether the defendant was *reckless* about the conduct being dishonest according to the standards of ordinary people. Nor is it sufficient that the defendant *should have known* that the alleged cartel conduct was dishonest according to the standards of ordinary people – the test is subjective not objective.

Comparison should also be made with the defence of claim of right that applies to many property offences.¹⁰¹ Denial of dishonesty does not require that the defendant entertain any particular *claim of entitlement* – the question is whether the defendant knew that the alleged cartel conduct was dishonest according to the standards of ordinary people. Nor does it matter whether any defence of claim of right is provided for in relation to the Cartel Offence¹⁰² – denial of the element of dishonesty does not depend on any defence of claim of right.

5.2 Problems of excessive subjectivity in offences against property

The second limb of the *Ghosh* test for dishonesty has often been criticised in the context of property offences for being excessively subjective.¹⁰³ In Black’s summation: “it allows an unacceptably open-ended range of defences — in particular it does not exclude the ‘Robin Hood’ defence and it allows something like a mistake of law to be a defence.”¹⁰⁴

Some courts in England have backtracked from *Ghosh* by introducing the notion of “obvious dishonesty” as a way of overriding the need for a direction squarely on the subjective second limb of the

¹⁰⁰ An error in Dean, “Creating a Stir” *New Law Journal*, 13 June 2003, as pointed out in Black, *Conceptual Foundations of Antitrust* (2005) 129.

¹⁰¹ See further P Fairall & S Yeo, *Criminal Defences in Australia* (4th ed 2004) ch 4.

¹⁰² Note Criminal Code (Cth) s 9.5(2) which provides that: “A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.” Query if this provision might become relevant in some cartel situations, as in a setting where IP rights are involved.

¹⁰³ See A Halpin, *Definition in the Criminal Law* (2003) 153-162.

¹⁰⁴ O Black, *Conceptual Foundations of Antitrust* (2005) 127-128.

Ghosh test.¹⁰⁵ However, the notion of “obvious dishonesty” is difficult to reconcile with *Ghosh* and is not part of the definition of dishonesty under the Criminal Code (Cth). Nor is it consistent with section 130.4 of the Criminal Code (Cth) which states that dishonesty is a matter of fact to be determined by the jury.

5.3 Problems of excessive subjectivity in the context of the Cartel Offence

The subjective limb of the *Ghosh* test for dishonesty raises numerous possibilities for defendants to deny liability on the basis of a subjective belief state that is inconsistent with the requirement under the *Ghosh* test of knowledge that the conduct was dishonest according to the standards of ordinary people. As Christopher Harding and Julian Joshua have commented:¹⁰⁶ “For defence lawyers ... the addition of dishonesty may already be viewed as a likely blessing. [It] will serve to introduce an extra layer of moral and factual argument which will in turn obfuscate a clear idea of the delinquency which it is sought to control through this offence.”

These are some of the possibilities:¹⁰⁷

- A defendant who relies genuinely on legal advice will be in a good position to deny that he or she knew that the conduct was dishonest. By contrast, the traditional rule in competition law and in criminal law in Australia is of course that ignorance or mistake of law is no excuse, even if honest and even if reasonable.¹⁰⁸
- Similarly, a defendant who has obtained expert economic advice to the effect that a transaction is unlikely to substantially lessen competition in a market may be in a good position to deny knowledge that the conduct was dishonest according to the standards of ordinary people.¹⁰⁹ On appropriate facts, a defendant advised by a skilled trial lawyer may well be able to use the expert economist’s report as evidence in support of the

¹⁰⁵ See A Halpin, *Definition in the Criminal Law* (2003) 160-162.

¹⁰⁶ Harding & Joshua, “Breaking up the Hard Core: The Prospects for the Proposed Cartel Offence” [2002] Criminal LR 933 at 939. That no one should underestimate the skills, ingenuity or perseverance of white collar defence lawyers is confirmed by the empirical study of US white collar defense attorneys at work in K Mann, *Defending White-Collar Crime* (1985). Consider also the thesis in A Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993).

¹⁰⁷ For one or two others see Harding & Joshua, “Breaking up the Hard Core: The Prospects for the Proposed Cartel Offence” [2002] Criminal LR 933 at 938.

¹⁰⁸ See *Review of the Competition Provisions of the Trade Practices Act* (2003) 156, rejecting the proposal of the ACCC that the cartel offence should impose liability only where the accused knew that the conduct was in breach of, or was likely to be in breach of, the law. I have been unable to locate the ACCC submission in which this proposal was made: this does not appear to be on the Treasury website along with other submissions to the Dawson Review. On the role and liability of gatekeepers, see generally J Coffee, Jr, *Gatekeepers: The Professions and Corporate Governance* (2006).

¹⁰⁹ Contrast the situation in Regulatory Policy Institute Oxford, Mock Trial, *Testing the Cartel Offence under the Enterprise Act* (2003) where “Sir” Zoltan Biro was called in to give expert economic evidence after the events giving rise to prosecution had occurred. The direction in the moot trial excluding that evidence from the jury’s assessment of the element of dishonesty (see at 69-70) is not instructive for cases where a defendant has relied on expert economic advice ex ante rather than ex post.

denial of dishonesty, and thereby introduce a competition effects analysis through this back door. A good faith belief that the expert report indicated that the conduct was not likely to be anti-competitive would be enough to negate dishonesty unless the jury lapsed into irrationality; it is unnecessary for the belief to be based on objectively reasonable grounds.

- Whether or not the parties embarking on a joint venture are “in competition” with each other under section 45A(1) or section 4D, is likely to depend on whether or not the *objective* purpose or likely effect of the joint venture is to achieve lower prices or increased output as measured by quantity or quality.¹¹⁰ Contrary to the suggestion of Heydon,¹¹¹ a *bona fide belief* (in the sense of a subjective belief as distinct from a belief based on objectively reasonable grounds) is unlikely to be sufficient in that context.¹¹² In the context of the element of dishonesty, however, the defendant has to *know* that the conduct is dishonest according to the standards of ordinary people and such knowledge will not be present where the defendant has an honest but mistaken belief that the collaborative arrangement will bring about lower prices or increased output.¹¹³
- A defendant may wish on appropriate facts to run a denial of dishonesty on the basis of a belief as to economic necessity or economic duress.¹¹⁴ The ardent subjectivist will learn much from the decisions of the High Court and Privy Council in the *Coal Vend case*¹¹⁵ (*AG (Cth) v Associated Northern Collieries* (1911) 14 CLR 387); (1913) 18 CLR 30) as well as from such other nadirs in competition law as the decision of the US Supreme Court in *Appalachian Coals v United States*, 288 US 344 (1933). Useful insights will also be gleaned from Geis’ account of the views of middle managers in the wake of the

¹¹⁰ Areeda & Hovenkamp *Antitrust Law* at 1906a; *Texaco Inc v Dagher*, 547 US (2006); *Arizona v. Maricopa County Medical Society*, 457 US 332 (1982); *Broadcast Music, Inc. v. CBS*, 441 US 1 (1979); *Northwest Wholesale Stationers v Pacific Stationery and Printing Co.*, 472 US 284 (1985); FTC/DOJ, *Antitrust Guidelines for Collaborations Among Competitors* (2000) at 3.2; DOJ/FTC, *Statements of Antitrust Enforcement Policy in Health Care* (1996), Policy Statement 8, Statement of Department of Justice and Federal Trade Commission Enforcement on Physician Network Ventures; Werden, “Antitrust Analysis of Joint Ventures” (1998) 66 *Antitrust LJ* 701, at 713-715; Bork, “The Rule of Reason and the Per Se Concept” (1966) 75 *Yale L.J.* 373, 474.

¹¹¹ *Trade Practices Law* at 4.860-4.890.

¹¹² Contrast the subjective purpose element of “for the purposes of a joint venture” for the new joint venture defence under sections 76C and 76D: Trade Practices Legislation Amendment Act 2006, Schedules 3-4; see the critique in Tyson, “Joint Venture Regulation under Australian Competition Law: An Update” (2006) 34 *Australian Business LR* 211 at 215-216.

¹¹³ See the comprehensive analysis in Harpham, Robertson & Williams, “The Competition Law Analysis of Collaborative Structures” (2006) ABLR.

¹¹⁴ See further Clarke, “Criminal Penalties for Contraventions of Part IV of the Trade Practices Act” (2005) 10 *Deakin LR* 141 at 161-162.

¹¹⁵ See further G Walker, *Australian Monopoly Law* (1967) 31-34.

heavy electrical equipment price fixing cases¹¹⁶ and Christine Parker's interview with Robert Wilson of Wilson Transformers, as quoted in section 4.3.¹¹⁷

- A defendant may be able to mount a successful denial of dishonesty where the conduct requires authorisation and where no application for authorisation has been made or is to be made. A genuine belief that an authorisation would be likely if applied for may easily mean that the jury will entertain a reasonable doubt as to whether the defendant knew that the conduct was dishonest. This is so whether or not authorisation is available in relation to the Cartel Offence.¹¹⁸
- IP rights may sometimes be an arena for competitors to talk about prices in circumstances where the discussion is structured to give the appearance and perhaps the reality of practical necessity. In the late 1990s Monsanto and Pioneer Hi-Bred International met often and agreed to charge higher prices for genetically modified seeds. They were sued for price fixing. Monsanto defended their conduct in the media partly on the basis that “[i]n the context of a potentially new license for technology, it is absolutely within the law to discuss the price and the means of compensation to the licensing party.”¹¹⁹
- Another possibility for a defendant is reliance on a pro-competitive intention, such as an intention to achieve the capacity to compete against large offshore competitors by banding together with local competitors,¹²⁰ an intention to intensify or maintain competition under the pretence of entering into a collusive arrangement¹²¹ or an intention to improve competition in some way (as suggested by *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44 ALR 557 at 566 per Lockhart J). On the orthodox interpretation of section 45A(1), a pro-competitive intention is not enough to take conduct outside the operation of the per se prohibition against price fixing. The analysis is very different when applying the element of dishonesty.¹²²

¹¹⁶ Geis, “The Heavy Electrical Equipment Cases of 1961” in G Geis & R Meier, eds, *White Collar Crime* (1977) 117-132.

¹¹⁷ Parker, “The ‘Compliance Trap’: The Moral Message in Responsive Regulatory Enforcement” (2006) 40 *Law & Society Rev* 591 at 607.

¹¹⁸ An issue discussed briefly in *Review of the Competition Provisions of the Trade Practices Act* (2003) 154.

¹¹⁹ This example is based directly on the account in Green, “Moral Ambiguity in White Collar Criminal Law” (2004) *Notre Dame Journal of Law, Ethics & Public Policy* 501 at 505.

¹²⁰ Contrast the rejection of good intentions generally as a defence in *US v United States Gypsum Co*, 340 US 76 at 87 (1950).

¹²¹ A hypothetical suggested by “Visy says cartel was not genuine” AFR 22-25 April 2006 5.

¹²² A pro-competitive intention would also be relevant to the requirement of an “intention to obtain a gain from a person or class of persons likely to acquire or supply the goods or services to which the cartel relates”. As Phillip Williams has explained (see section 2.3), this may mean that the gain by a selling cartel must be at the expense of those to whom they sell and that the gain by a buying cartel must be made at the expense of those from whom they buy. Note however that denial of dishonesty is not limited to cases where defendants are able

- The economic literature is replete with papers that challenge per se prohibitions by pointing out that various practices that are prohibited per se are welfare enhancing.¹²³ The collection of such papers in the library of the compleat cartelist will include Evans and Mellsoy's luminous contribution to the denial of dishonesty, "Exchanging Price Information Can Be Efficient" (2003) and such mind-altering works as Arndt Christiansen and Wolfgang Kerber's "Competition Policy with Optimally Differentiated Rules Instead of 'Per se Rules vs. Rule of Reason'" (2006).¹²⁴ Disbelief in the idea that per se prohibitions reflect "the ordinary standards of people" will be further reinforced by such bedside reading as the Three Tenors case, where it was accepted that the "dichotomous categorical approach" (ie categorizing collaborative arrangements as being subject to either per se or rule of reason analysis) has given way to "to a more nuanced and case-specific inquiry."¹²⁵

While acquitting the defendant in some or possibly even all of the scenarios above may have a superficial appeal, the end does not justify the means. Loose subjectivised notions of dishonesty are likely to generate inconsistent and unduly generous decisions. If, as a matter of policy, it is thought desirable to allow a defence of ignorance or mistake of law, or reliance on official advice or an expert economist's opinion,¹²⁶ the first question is whether any such defence should be limited to the Cartel Offence rather than being made a general defence. If there is to be a defence, general or special, the defence would then need to be defined in accordance with standard definitional form and practice for defences in our criminal law. Additionally, consideration should be given to the possible desirability of placing a persuasive burden of proof on the defendant and limiting the defence to a belief based on objectively reasonable grounds.

5.4 Inegalitarian bias

The opportunity to deny dishonesty on the basis of a subjective belief based on legal advice, expert economic advice and the assistance of the best trial lawyers that money can buy has an obvious inegalitarian bias. Small to medium unsophisticated companies are unlikely to have the mind-set or financial resources to exploit the subjectivist element of the *Ghosh* test in the way that larger or more sophisticated companies can and doubtless will do.

It may be argued that the inegalitarian bias in question exists generally in our system of criminal justice and is inevitable. However, in my view, that would be a glib and unpersuasive response. The subjective element of the *Ghosh* test gives an unusual degree of latitude to smart, well resourced

to deny the element of an intention to obtain a gain at the expense of those to whom they sell or those from whom they buy.

¹²³ The distinction between per se rules and rules of reason is discussed in O Black, *Conceptual Foundations of Antitrust* (2005) ch 3. See also Schauer and Zeckhauser, "Regulation by Generalization" (2005).

¹²⁴ (2006) 2 *Journal of Competition Law and Economics* 215.

¹²⁵ *Polygram Holdings, Inc v FTC*, 416 F 3d 29 (2005).

¹²⁶ See further Parry, "Mistake, and Official Interpretations of Law" (1997) 25 *American Criminal Law Review* 1.

corporate defendants. The effect is to confer almost a form of lawless tribal self-determination,¹²⁷ namely the ability of groups of cartelists, or groups of managers within each cartel participant, to create subjective personalised avenues for negating the knowledge of dishonesty element of the *Ghosh* test under the Cartel Offence (see the examples in section 5.3 above).

The inequalitarian concerns that led to the proposal in 2002 that small companies be exempted from any cartel offence¹²⁸ seem to pale into relative insignificance when compared with the opportunities for acquittal that the subjective element of the *Ghosh* test of dishonesty would gift to large and clever corporations. The civil per se prohibitions do give the law a backstop against corporations who orchestrate denials of dishonesty. However, the concern here is not about backstops – the concern is about having an even playing field.

6. ALTERNATIVE POSSIBLE APPROACHES TO DEFINITION OF THE “CARTEL OFFENCE”

6.1 Options and definitional parameters

Assuming that cartel conduct is to be made the subject of an offence, there are various possible alternatives to defining the cartel offence in terms of a requirement of an “intention to dishonestly obtain a gain” as proposed in the Criminalisation Proposals.

These are some of the possible options:¹²⁹

- (1) retain the element of dishonesty (but not the requirement of an intention to obtain a gain) and redefine dishonesty in terms that avoid reliance on the loose notion of the “ordinary standards of people” (Option 1);
- (2) require the defendant to have engaged in the cartel conduct (price fixing, restricting output, bid rigging or market sharing) with recklessness in relation to all physical elements of the offence (Option 2);
- (3) modify Option 2 by following the mental element for criminal liability under section 1 of the Sherman Act as interpreted in *US v United States Gypsum Co*, 438 US 422 (1978) or by requiring a common intention to have fix prices or restrict supply (Option 3);

¹²⁷ Contrast Washburn, “Federal Criminal Law and Tribal Self-Determination” (2006) 84 North Carolina LR.

¹²⁸ See *Review of the Competition Provisions of the Trade Practices Act* (2003) 149; Law Council of Australia, Submissions to the Dawson Committee (2002) 87-88.

¹²⁹ There are other possible permutations and combinations of the options. There are also other options; even as broadly defined a mental element as an “intention to cause serious economic harm” would be an advance on “dishonesty” (the term “serious economic harm” is used at one point in the Press Release).

- (4) modify Option 2 by narrowing the definition of price fixing, restricting output, bid rigging or market sharing (eg by limiting cartel conduct to “agreements” and excluding indirect price fixing in a downstream market) (Option 4);
- (5) adopt Option 3 plus Option 4 (Option 5);
- (6) adopt one of Options 2-5 and provide a special defence (eg a defence of public benefit) (Option 6);
- (7) define the cartel offence in terms of a conspiracy for the unlawful object of price fixing, restricting output, bid rigging or market sharing (as defined under Option 2 or Option 4) (Option 7);
- (8) adopt one of Options 2-5 and guide prosecutorial discretion by specifying a measure of affected commerce, namely that the specific line of commerce likely to be affected by the cartel represent a minimum percentage (say 20%) or more of the value of sales by all competitors who compete in that specific line of commerce in the relevant geographic market during a specified period (Option 8);
- (9) adopt one of Options 2-5 and require, as a jurisdictional element of the Cartel Offence, that the specific line of commerce likely to be affected by the cartel represented a minimum percentage (say 20%) or more of the value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market during a specified period (Option 9); or
- (10) adopt one of Options 2-5, plus Option 8 and Option 9 (Option 10).

Option 1 is discussed and rejected in section 6.2 below.

The task of defining a cartel offence in terms that avoid the concept of dishonesty and limit the offence to “serious cartel conduct” requires consideration of at least each of these parameters:

- constraints on prosecutorial discretion (see section 6.3);
- mental element of the cartel offence (see section 6.4)
- physical elements of the cartel offence (see section 6.5)
- exemptions and defences (see section 6.6); and
- corporate criminal responsibility (section 6.7).

By working through the possibilities in this structured way, it becomes possible to show that a cartel offence can be limited to serious cartel conduct without any need to rely on the highly problematical concept of dishonesty. As will emerge, one possible alternative to the Cartel Offence is an offence of Conspiracy to Subvert Competition based on a systematic review of the possible options (see section 6.8).

6.2 Redefine dishonesty for the Cartel Offence?

Redefining dishonesty is theoretically possible but attempts to date to adopt this approach in the context of cartel conduct do not seem proximate.

Black has advanced this redefinition of dishonesty:¹³⁰

Roughly, a person's action is dishonest if (a) it is wrong and (b) he does it in a manner that he intends to conceal either (i) the fact that he is doing it or (ii) the fact that it is wrong. This model is weakly analogous to *Ghosh* in that it contains one limb that may be called objective and another that may be called subjective: (a) is objective in the sense that it concerns the wrongness of the action, not the agent's belief as to its wrongness; (b) is subjective in the thin sense that it refers to the agent's intention. The model can be refined in various ways: for example 'wrong' might be amplified to cover other moral categories, such as certain actions that are bad in some respect without being wrong; clause (b) might be expanded to provide for a specified category of people from whom the relevant fact is concealed; and more might be said about the distinction between an action and the manner in which it is performed.

While this suggested redefinition of dishonesty avoids the circularity and excessive subjectivity of the *Ghosh* test, it is otherwise uncommendable. First, "wrong" is a poor substitute for legal rules of the kind that now apply under Part IV of the Trade Practices Act.¹³¹ Secondly, it is difficult to understand why concealment should be a necessary condition of liability.¹³² Brazen cartels and cartels of defiance that thumb their noses at the authorities and the community are prime candidates for prosecution for the Cartel Offence.

In any event, redefining dishonesty is a very limited possible solution because it does not address all the relevant definitional parameters of offence seriousness. For example, it does not speak to the type or amount of economic harm that is highly relevant as a measure of offence seriousness (see sections 6.3, 6.5 and 6.8 below).

¹³⁰ O Black, *Conceptual Foundations of Antitrust* (2005) 138.

¹³¹ The use of the concept "wrong" in the defence of insanity under the McNaghten Rules raises a similar problem; see Colvin, "Ignorance of Wrong in the Insanity Defence" (1981) 19 Univ of Western Ontario LR 1 at 12-20; B Fisse, *Howard's Criminal Law* (5th ed 1990) 466-467.

¹³² Compare the questionable assumption made in M Furse & S Nash, *The Cartel Offence* (2004) 36.

6.3 Constraints on prosecutorial discretion and judicial discretion to dismiss a charge

The main possible options are:

- (1) follow the status quo;
- (2) adopt a threshold value of affected commerce requirement that the value of affected commerce exceeded \$1 million within a 12 month period (ie where the combined value for all cartel participants of the specific line of commerce affected by the cartel exceeded \$1 million within a 12 month period, and, for bid rigging cases, where the value of the successful bid or series of bids exceeded \$1 million within a 12 month period) a value of affected commerce threshold of \$1 million;
- (3) adopt a value of affected commerce threshold that the specific line of commerce likely to be affected by the cartel represented a minimum percentage (say 20%) or more of the combined value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market during the period when that specific line of commerce was affected by the cartel or a specified period linked to the time of the alleged offence;
- (4) follow (3) or (4) and add a quick look competition test;
- (5) grant a discretion to a court to “dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so” as for conspiracy under section 11.5(6) of the Criminal Code (Cth).

Approach (1) does not seem compelling given that prosecutorial discretion may not always be exercised appropriately. The prosecution of Rene Rivkin for insider trading in a transaction that netted him \$346 is likely to haunt the business community for some time.¹³³ Moreover, the current Prosecution Policy of the Commonwealth may need some revision (for example, including more detailed guidance on the prosecution of corporations, and closer alignment to the factors relevant under the US Sentencing Guidelines) (see section 2.5).

As discussed in section 2.5, approach (3) seems preferable to approach (2) because it avoids the over-inclusiveness and under-inclusiveness of a threshold expressed in terms of a fixed monetary value such as \$1 million.

¹³³ See “Insider Trading is No Trivial Matter” *The Age*, 3 June 2003. Rivkin was convicted and sentenced to nine months of weekend detention and fined \$30,000. Contrast the civil treatment of Steve Vizard: *ASIC v Vizard* [2005] FCA 1037; “Vizard ‘a true insider’, says Rivkin’s lawyer” *SMH*, 6 July 2005.

Approach (4) would add the constraint of requiring the ACCC to satisfy itself on a “quick look” basis that the cartel conduct was likely to substantially lessen competition in a market or significant segment of a market (see section 2.5). Arguably, this constraint is unnecessary if approach (3) is adopted. Approach (3) reflects a presumption that if: (a) the specific line of commerce likely to be affected by the cartel represented a minimum percentage (say 20%) or more of the combined value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market; and (b) there is evidence to establish the mental element and the physical elements of the offence,¹³⁴ the chances are that the cartel conduct had the effect or likely effect of substantially lessening competition in a significant segment of the market.

Approach (5) would provide a judicially controlled safety valve in cases where, for example, criminal prosecution has been used for some oppressive purpose in circumstances where civil penalty proceedings or no enforcement proceedings would have been more appropriate.¹³⁵

6.4 Mental element of the cartel offence

The range of possible mental elements appears to be:

- (1) recklessness by each party in relation to all physical elements of the offence; or
- (2) knowledge of probability by each party in relation to all physical elements of the offence; or
- (3) intention¹³⁶ on the part of two or more parties and recklessness by the remaining parties in relation to all physical elements of the offence; or
- (4) intention on the part of all parties in relation to all physical elements of the offence; or
- (5) intention as in (4) plus recklessness on the part of all parties that the specific line of commerce likely to be affected by the cartel represented a minimum percentage (say 20%) or more of the combined value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market during the period when that specific line of commerce was affected by the cartel or a specified period linked to the time of the alleged offence; or

¹³⁴ Including the mental element of an intention on the part of all parties to increase bargaining power at the expense of those with whom the cartel deals; see section 2.3.

¹³⁵ See Criminal Code (Cth) s 11.1(6) in the context of the general offence of conspiracy.

¹³⁶ Contrast the objective purpose analysis in Robertson, “The Primacy of Purpose in Competition Law – Pt 2” (2002) 9 CCLJ 101 in the context of civil liability.

- (6) intention as in (4) or intention and recklessness as in (5) plus an intention on the part of all parties to increase their bargaining power at the expense of those with whom the cartel deals.

Mental element (1) is similar to the approach recommended by the ACCC in its submission to the Dawson Committee.¹³⁷ Recklessness is a defined mental element under the Criminal Code (Cth)¹³⁸ and requires that the defendant must have been aware of “a substantial risk” as distinct from “likelihood” or “high likelihood”. This is a minimal limitation on the scope of the offence and holds little appeal.

Mental element (2) reflects Harding and Joshua’s wonderment as to why dishonesty was made an element of the cartel offence in the UK rather than following the US model under section 1 of the Sherman Act as interpreted by the US Supreme Court.¹³⁹ In *US v United States Gypsum Co* 438 US 422 (1978) the US Supreme Court held that the offences under the Sherman Act required proof of intention or knowledge of the probable consequences (in the case of price fixing, knowledge of the probability that the arrangement would result in the fixing of prices).¹⁴⁰ “Knowledge of probable consequences” is a somewhat more restrictive mental element than recklessness as defined under the Commonwealth Criminal Code but less restrictive than intention as defined under the Code and less restrictive than a requirement of common intention parallel to the requirement of a common purpose under section 4D (a questionable asymmetry discussed below).

Mental element (3) requires an *intention* to bring about price fixing or another defined type of cartel conduct (as defined by the Cartel Offence).¹⁴¹ Under section 5.2(3) of the Criminal Code (Cth): “A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events”. This approach has been supported by the Law Council in its submission to the Working Party in 2003.¹⁴² Under the approach recommended by the Law Council, at

¹³⁷ ACCC, Submission to the Trade Practices Act Review (June 2002) 2.6.3.

¹³⁸ Criminal Code (Cth) s 5.4.

¹³⁹ Harding & Joshua, “Breaking up the Hard Core: The Prospects for the Proposed Cartel Offence” [2002] Criminal LR 933 at 937.

¹⁴⁰ Compare *R v Nova Scotia Pharmaceutical Society* (1992) SCR 606; Hughes & Sanderson, “Conspiracy Law and Jurisprudence in Canada: Towards an Economic Approach” (1998) 13 Rev of Industrial Economics 153.

¹⁴¹ A requirement of intention is a traditional mental element in criminal law and is entrenched under the Criminal Code (Cth) but is not consistent with objective “purpose” as illuminated in Robertson, “The Primacy of Purpose in Competition Law – Pt 2” (2002) 9 CCLJ 101. “Purpose” under section 4D and section 45 has been held to be subjective: *News Limited v South Sydney District Rugby League Football Club Ltd* [2003] HCA at [18] per Gleeson CJ. See also French, “Mental States in Civil Litigation” (2003). Corporate intentionality in the sense of a corporate policy is one form of objective purpose; see Fisse, “The Attribution of Criminal Liability to Corporations” (1991) 13 Sydney Law Review 277.

¹⁴² Contrast *US v United States Gypsum Co*, 438 US 422 at 445-446 (1978): “The business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits, and risks. A requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator’s knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent.”

least two of the parties to the alleged cartel arrangement must intend the arrangement to have the prescribed effect (in the case of price fixing, the effect of fixing, controlling or maintaining the price of the relevant goods or services).¹⁴³ That approach is consistent with the mental element of conspiracy under the Criminal Code (Cth).¹⁴⁴ However, like mental element (2), it departs from the requirement of a common purpose under section 4D of the Trade Practices Act.¹⁴⁵ It also departs from the requirement under Australian common law that all parties to an alleged conspiracy have a common intention.¹⁴⁶ If section 4D is to remain in its present form (no one seems to have suggested that the common purpose requirement should be relaxed), it is difficult to see why the mental element of the Cartel Offence should be less exacting than the mental element under the civil penalty provisions that apply to exclusionary arrangements. Accordingly, mental element (4) seems preferable to mental element (3).

Mental element (5) requires recklessness that the cartel conduct will affect a significant amount of commerce. A significant amount of commerce is affected where the specific line of commerce likely to be affected by the cartel represented a minimum percentage (say 20%) or more of the combined value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market during the period when that specific line of commerce was affected by the cartel or a specified period linked to the time of the alleged offence. This mental element reflects the proposed limit on prosecutorial discretion discussed in section 6.3 above.

Mental element (5) precludes liability unless the defendant was aware that a significant amount of commerce was likely to be affected by the alleged cartel conduct. However, mental element (5) in itself would not preclude liability in cases where commerce would be affected pro-competitively and not adversely. Accordingly, an additional mental element is necessary, namely mental element (6), as discussed below.

Mental element (6) complements mental element (5) by requiring that there be an intention on the part of all parties to increase bargaining power at the expense of those with whom the cartel deals. This reflects the reformulation of the “intention to obtain a gain” element of the Cartel Offence discussed in section 2.3. As Williams has explained, the requirement of an intention to increase bargaining power at the expense of those with whom the cartel deals would rule out liability in several situations including

¹⁴³ Law Council of Australia, Submission to the Working Party on Penalties for Cartel Behaviour, 12 December 2003, 10-11.

¹⁴⁴ Criminal Code (Cth) s 11.5.

¹⁴⁵ *Carlton and United Breweries (NSW) Pty Limited v Bond Brewing NSW Limited* (1987) ATPR ¶40-820 at 48,880.

¹⁴⁶ See *Gerakiteys v The Queen* (1983) 153 CLR 317, as discussed in B Fisse, *Howard's Criminal Law* (5th ed, 1990) 370-375. At an opposite extreme is the proposal in Kennish & Ross, “Toward a New Canadian Approach to Agreements Between Competitors” (1997) 28 Canadian Business LJ 22 at 64 that the mental element be expressed merely in terms of whether the defendant “ought reasonably to have known” that the cartel arrangement would result in eg the fixing of a price. For other infertile proposals from Canada, see Trebilcock, Winter, Collins and Iacobucci, *The Law and Economics of Canadian Competition Policy* (2003) 125-130.

the credit card interchange fee matter where the ACCC took enforcement action against the NAB in 2000.¹⁴⁷

Of these various possible mental elements, arguably mental element (6) is that best attuned to limiting the Cartel Offence to serious cartel conduct.

The mental element of secondary parties raises further issues that need to be unravelled. For example, the mental element for aiding and abetting under section 11.2 of the Criminal Code (Cth) is not the same as that for being knowingly concerned in an offence. Note also that a common intention would not necessarily need to be established against a secondary party. However, where individuals are charged as principal offenders, under mental elements (3)-(6) above a common intention would need to be established against them.

6.5 Physical elements of the cartel offence

The main possible options are:

- (1) define cartel conduct in terms of price fixing, bid rigging, restriction on output or market sharing instead of relying on the broader definitions of the per se civil penalty prohibitions under section 45;
- (2) define cartel conduct more narrowly than under (1) as by limiting the offence to “agreements” and excluding indirect price fixing in a downstream market;
- (3) follow (1) or (2) but add a jurisdictional element that the specific line of commerce likely to be affected by the cartel represented a minimum percentage (say 20%) or more of the combined value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market during the period when that specific line of commerce was affected by the cartel or a specified period linked to the time of the alleged offence;
- (4) follow (3) but add a competition test.

Approach (1) is that taken under the Criminalisation Proposals.

Approach (2) reflects the view that cartel conduct should be more narrowly defined so as to focus on the most egregious forms of cartel conduct. The possibilities include:

¹⁴⁷ See Statement of Claim, Federal Court of Australia, No N 948 of 2000.

- limiting the offence to “agreements” and not including “arrangements” or “understandings”, consistently with the Criminal Code (Cth) provisions for the offence of conspiracy;¹⁴⁸
- limiting the offence to impacts upon the same market as that to which the cartel agreement relates (ie excluding indirect price fixing in a downstream market, as in the credit card interchange fee case of *ACCC v NAB* in 2000¹⁴⁹);
- excluding maximum price fixing by sellers and minimum price fixing by buyers;¹⁵⁰
- excluding liability for attempts, consistently with the Criminal Code (Cth) provisions on the offence of conspiracy;¹⁵¹ and
- excluding liability where all other parties to the alleged conspiracy are acquitted and a finding of guilt would be inconsistent with their acquittal.

Approach (2) has various merits. One is to bring the Cartel Offence more into line with the offence of conspiracy under the Criminal Code (Cth).¹⁵² Another is to make it unnecessary in a case such as *ACCC v NAB* (2000)¹⁵³ for a corporation in the position of NAB to have to establish the joint venture defence under section 76C or section 76D.¹⁵⁴

Approach (3) would keep the ACCC and the DPP honest by making a measure of offence seriousness a jurisdictional element of the cartel offence. This jurisdictional element need not necessarily require any mental element. However, a more principled approach is to require recklessness in relation to this jurisdictional element, as envisaged under mental element (5) in section 6.4 above.¹⁵⁵ It seems unlikely that businesspeople or juries would have difficulty understanding and applying the value of affected commerce test relevant under approach (3), with the possible exception of cases at the margin where jurisdiction depends on geographic market definition.

¹⁴⁸ Query whether or not this would make much difference in practice, at least on the interpretation adopted in *APCO Service Stations Pty Ltd v ACCC* [2005] FCAFC 161; see Guirguis, “29 out of 69: Proving an ‘Arrangement or Understanding’ Relying on Indirect Evidence” (2006) Law Council trade practices workshop, July 2006.

¹⁴⁹ See Statement of Claim, Federal Court of Australia, No N 948 of 2000.

¹⁵⁰ See further Easterbrook, “Maximum Price Fixing” (1981) 48 U Chicago LR 886.

¹⁵¹ Criminal Code (Cth) s 11.1(7). Contrast Law Council of Australia, Submission to the Working Party on Penalties for Cartel Behaviour, 12 December 2003, 2.10 which contends that liability for attempt should exist but without exploring the implication of s 11.1(7).

¹⁵² Criminal Code (Cth) s 11.

¹⁵³ See Statement of Claim, Federal Court of Australia, No N 948 of 2000.

¹⁵⁴ Trade Practices Legislation Amendment Act 2006, Schedules 3-4.

¹⁵⁵ See Singer, “The Model Penal Code and Three Two (Possibly Only One) Ways Courts Avoid Mens Rea” (2001) 4 Buffalo Criminal LR 139.

Approach (4) would require a competition test parallel to that applicable to the general prohibition against anti-competitive agreements under section 45 of the Trade Practices Act. However, a competition test seems unnecessary if approach (3) is adopted. Approach (3) reflects a presumption that if: (a) the specific line of commerce likely to be affected by the cartel represented a minimum percentage (say 20%) or more of the combined value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market; and (b) there is evidence to establish the mental element and the physical elements of the offence,¹⁵⁶ the chances are that the cartel conduct would have the effect or likely effect of substantially lessening competition in a significant segment of the market.

6.6 Exemptions and defences¹⁵⁷

The main possible exemptions and defences are:

- (1) exemptions parallel to those which apply to the civil per se prohibitions under the Trade Practices Act and a joint venture defence parallel to that under new sections 76C and 76D;¹⁵⁸
- (2) exemptions parallel to those which apply to the civil per se prohibitions and a joint venture defence specific to the cartel offence and based on the joint venture defence under new sections 76C and 76D except that, in relation to the competition test, it is sufficient for the defendant to establish that there was no awareness of the likelihood of substantially lessening competition in a market;
- (3) a defence of public benefit;
- (4) a defence of mistake of law based on reasonable reliance on legal, economic or official advice;

¹⁵⁶ Note especially the limiting effect of an intention to increase bargaining power at the expense of those with whom the cartel deals, as discussed in sections 2.3 and 6.4.

¹⁵⁷ Ideally, exemptions and defences to offences under the Trade Practices Act need to be located within a theoretical framework of justification or excuse or a more cogent alternative than traditional theories of justification and excuse. This is beyond the scope of this paper. See further Westen, "An Attitudinal Theory of Excuse" (2006) 25 Law and Philosophy 289.

¹⁵⁸ Trade Practices Legislation Amendment Act 2006, Schedules 3-4. This approach attracts the unsatisfactory doctrine of one-dimensional interpretation espoused in *Waugh v Kippen* (1986) 160 CLR 156. According to *Waugh v Kippen*, where the same statutory wording is used for the purposes of civil and criminal proscription the one interpretation must be adopted; the legislature cannot be taken to have spoken with "a forked tongue". Under this approach, the mental element of the joint venture defence under section 76C or section 76D would be the same for the cartel offence as for the civil penalty prohibitions. There is no obvious justification for a subjective purpose test in relation to the element of "for the purposes of a joint venture" under sections 76C and 76D in the context of civil penalty provisions. For a more sensible purposive approach to the interpretation of provisions that apply to criminal and civil liability, see *Hurst v Vestcorp Ltd* (1988) 13 ACLR 17, at 26 per Kirby P; *United States v United States Gypsum Co*, 438 US 422, at 436-443 (1978).

- (5) a defence of economic duress or necessity.

Approach (1) is that taken under the Criminalisation Proposals. The new joint venture defence¹⁵⁹ would enable acquittal in the case of efficiency-driven joint ventures that also pass the competition test (the credit card interchange fee enforcement action brought by the ACCC against the NAB in 2000¹⁶⁰ is a possible example, subject to a full analysis of the competition effects in downstream markets).

Approach (2) reflects an attempt to align the joint venture defence with the general principle that the mental element for criminal liability should be intention, knowledge or recklessness where the offence carries the possibility of a jail term. Approach (2) requires awareness of the likelihood of substantially lessening competition (compare recklessness under the Criminal Code (Cth), which requires awareness of merely “a substantial risk”). By contrast, the defence under section 76C or section 76D cannot be made out unless the defendant can establish the necessary condition of the defence that there was no *objective likelihood* of substantially lessening competition.

Approach (3) follows the proposal of the Law Council in its submission to the Dawson Committee that a cartel offence should be subject to a special defence of public benefit.¹⁶¹ This approach would appear to require an efficiencies analysis of a kind too demanding for a criminal jury trial. An alternative approach is of course to exempt parties from the cartel offence only where the relevant conduct has actually been authorised.

Approach (4) is similar to one proposal that the ACCC made to the Dawson Committee.¹⁶² Although there may be merit in a general defence of reasonable mistake of law, that approach has not been followed under the Criminal Code (Cth) or elsewhere in Australian federal, state and territorial criminal law.¹⁶³ There is no apparent justification for making mistake of law a defence specially for the cartel offence.

Approach (5) would create a new defence of economic duress or necessity. There is no apparent support for this possible defence generally in the criminal law or specially for the cartel offence.¹⁶⁴

¹⁵⁹ Trade Practices Legislation Amendment Act 2006, Schedules 3-4, s 76C, s 76D.

¹⁶⁰ Statement of Claim, Federal Court of Australia, No N 948 of 2000.

¹⁶¹ Law Council of Australia, Submissions to the Dawson Committee (2002) 89. See also OECD, *Fighting Hard-Core Cartels Harm, Effective Sanctions and Leniency Programmes* (2002) 100 (hard core cartel conduct defined in terms that exclude conduct reasonably related to achieving efficiencies).

¹⁶² *Review of the Competition Provisions of the Trade Practices Act* (2003) 156.

¹⁶³ See Criminal Code (Cth) ss 9.3, 9.4; contrast the claim of right provisions in s 9.5. See further B Fisse, *Howard's Criminal Law* (5th ed 1990) 505-511; Parry, “Mistake, and Official Interpretations of Law” (1997) 25 *American Criminal Law Review* 1.

¹⁶⁴ Other than by implication from the Criminalisation Proposals, which allow and thereby condone denials of dishonesty based on subjective beliefs that cartel conduct is eg a matter of economic necessity (see section 5.3 above).

6.7 Corporate criminal responsibility

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

- (1) vicarious responsibility parallel to vicarious liability under section 84 of the Trade Practices Act;
- (2) corporate responsibility under the Criminal Code (Cth) provisions on corporate criminal responsibility;¹⁶⁵
- (3) vicarious responsibility subject to a defence that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct, as under section 44ZZO and section 152EO of the Trade Practices Act.

Approach (1) follows section 84, which has given the ACCC a low barrier to clear when seeking to establish liability for civil penalties and remedies. However, vicarious liability is a form of strict liability and is inconsistent with the general principle that criminal responsibility is personal, not vicarious, and requires fault.¹⁶⁶

Approach (2) follows the Criminal Code (Cth). The general principle of corporate responsibility under the Criminal Code (Cth) seeks to reflect the concept of corporate blameworthiness by requiring fault that is corporate in nature rather than merely fault on the part of “a directing mind” under the principle in *Tesco Supermarkets Ltd v Natrass*.¹⁶⁷ The Criminal Code provisions depart from the *Tesco* principle in two main ways:

- The physical elements of an offence are attributable to a corporation on a much broader basis than under the directing mind principle. It is unnecessary to prove that a representative who is directing mind of the corporation engaged in the relevant conduct. It is sufficient that the conduct is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority (section 12.2).
- The mental element of an offence is attributable to a corporation on a different basis than under the directing mind principle. Under section 12.3(1), if intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element is attributable to a body corporate that expressly, tacitly or impliedly authorised

¹⁶⁵ Criminal Code (Cth) s 12.

¹⁶⁶ See further B Fisse, *Howard's Criminal Law* (5th ed 1990) 604.

¹⁶⁷ [1972] AC 153. On the weaknesses of the *Tesco* principle see B Fisse, *Howard's Criminal Law* (5th ed 1990) 601-603. On the Criminal Code provisions see further Hill, *Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?* [2004] *Jnl of Business Law* 1.

or permitted the commission of the offence. Section 12.3(2) provides that this corporate fault element can be established by:

- (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

It is unclear whether or not (a) above applies to an ulterior intention.¹⁶⁸ If not, then the requirement of an "intention dishonestly to obtain a gain" will be attributable to a corporate defendant under the highly unsatisfactory common law principle in *Tesco Supermarkets Ltd v Natrass*.¹⁶⁹

Corporate responsibility on basis (b) above does not apply if the body corporate proves that it "exercised due diligence to prevent the conduct, or the authorisation or permission."

The Criminal Code provisions raise a considerable barrier for the prosecution, at least in the context of cartel conduct:

- Rare will be the case where a board gets involved in cartel conduct or fails to have boilerplate precautions in place to thwart attempts to sheet home criminal responsibility.
- The concept of a "high managerial agent" is ill-defined¹⁷⁰ but goes further than the *Tesco* precept of "a directing mind". Even so, cartel offences are often likely to be perpetrated on the front lines of middle management rather than in the much more remote command posts of high managers.

¹⁶⁸ See section 2.6(b) above.

¹⁶⁹ See section 2.6(b) above.

¹⁷⁰ Under s 12.3(6) "*high managerial agent* means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy." Contrast the avoidance of this concept in the statutory model set out in Fisse, "The Attribution of Criminal Liability to Corporations" (1991) 13 Sydney Law Review 277.

- The concept of a “corporate culture” does project the animating idea of corporate blameworthiness. However, the concept has yet to be tested and appears to require proof of conditions and attitudes within an organisation that go considerably beyond merely proving that the managers immediately involved in the cartel conduct acted with criminal intent. Moreover, expert sociological evidence would seem relevant to prove or disprove the existence of a corporate culture.

The classic heavy electrical price fixing conspiracies in the USA in the late 1950s and early 1960s¹⁷¹ invite this speculation: would the prosecutions against GE, Westinghouse and the other larger transformer companies have succeeded if the US DOJ had been required to establish liability under the Criminal Code provisions for corporate criminal responsibility? Considerable difficulty would have been encountered given that the companies assiduously blamed middle management for breaching the antitrust compliance policy that each company had in place. In particular, the companies would have answered, not without some degree of credibility, that no high managerial agent was implicated in the price fixing, and that their antitrust compliance policies and programs indicated that they had exercised due diligence and did not have a corporate culture given to price fixing.

The prosecution would face much less of a hurdle if, as under approach (3), vicarious responsibility is imposed subject to a defence that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct. This is the approach adopted in section 44ZZO and section 152EO of the Trade Practices Act and in provisions governing corporate responsibility in numerous Acts of the Commonwealth, including the corporate offence provisions in section 65 of the Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (Cth). One feature of this approach is that it focuses on the standard of reasonable precautions and due diligence expected of a corporation engaged in the same kind of commerce – the standard is not based merely the standard of any given individual within the company.¹⁷²

Approach (3) is a pragmatic compromise that avoids the risk that the cartel offence may break down under the load of what the prosecution must prove to establish corporate criminal responsibility under the provisions of Criminal Code (Cth).

6.8 Resulting offence of “Conspiracy to Subvert Competition” without a dishonesty element

The outline above suggests that it is possible to define a cartel offence and limit its application in a way that dispenses with the element of dishonesty under the Cartel Offence and yet which more adequately reflects the seriousness of serious cartel conduct.

Consider the following possible approach:

¹⁷¹ See RA Smith, *Corporations In Crisis* (1966) chs 5-6.

¹⁷² Fisse "The Attribution of Criminal Liability to Corporations" (1991) 13 Sydney Law Review 277 at 292.

Constraints on prosecutorial discretion and judicial discretion to dismiss a charge

- (a) adopt a value of affected commerce threshold that the specific line of commerce likely to be affected by the cartel represented a minimum percentage (say 20%) or more of the combined value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market during the period when that specific line of commerce was affected by the cartel or a specified period linked to the time of the alleged offence; and
- (b) grant a discretion to a court to dismiss a charge if it thinks that “the interests of justice require it to do so”, as for conspiracy under section 11.5(6) of the Criminal Code (Cth).

Mental element of the cartel offence

- (a) require intention on the part of all parties in relation to all physical elements of the offence; and
- (b) require recklessness on the part of all parties that the specific line of commerce likely to be affected by the cartel represented a minimum percentage (say 20%) or more of the combined value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market during the period when that specific line of commerce was affected by the cartel or a specified period linked to the time of the alleged offence; and
- (6) require intention on the part of all parties to increase bargaining power at the expense of those with whom the cartel deals.

Physical elements of the cartel offence

- (a) define cartel conduct in terms of price fixing, bid rigging, restriction on output or market sharing but limit the offence in several additional ways, as by requiring an agreement” and excluding indirect price fixing in a downstream market; and
- (b) require, as a jurisdictional element of the offence, that the specific line of commerce likely to be affected by the cartel represented a minimum percentage (say 20%) or more of the combined value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market during the period when that specific line of commerce was affected by the cartel or a specified period linked to the time of the alleged offence.

Exemptions and defences

- (a) adopt exemptions parallel to those which apply to the civil per se prohibitions (eg under section 51; authorisation); and
- (b) provide a joint venture defence specific to the cartel offence and based on the joint venture defence under new sections 76C and 76D except that, in relation to the competition test, it is sufficient for the defendant to establish that there was no awareness of the likelihood of substantially lessening competition in a market;

Corporate criminal responsibility

- (a) make corporations vicariously responsible for the conduct and mental element of employees and agents acting within the scope of their actual or apparent authority; and
- (b) provide a defence that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct, as under section 44ZZO and section 152EO of the Trade Practices Act.

The purpose of setting out this possible approach is not to offer a blueprint for legislation but simply to demonstrate that: (1) the element of dishonesty in the Cartel Offence is unnecessary; and (2) it is possible entirely to avoid the practical difficulties and indeed the sheer nonsense of notions of “standards of ordinary people” and “knowledge that conduct was dishonest according to the standards or ordinary people”.

An offence defined along the lines indicated warrants a better name than “Cartel Offence”. The title “cartel offence” seems to have been created by someone with little awareness of the scarlet appellations used for serious offences generally in the criminal law and no inkling of the ways of Thurman Arnold and other agents of change in US antitrust history.¹⁷³ Titles more in keeping with the symbols of government in this area as well as with the gist of the offence include “Conspiracy to Subvert Competition”¹⁷⁴ and “Collusive Subversion of Competition.” The offence of conspiracy offers at least two advantages: first, “conspiracy” directly and strongly signals the danger of group plots to undermine competition; and secondly, the offence is hardly novel but the subject of established rules and principles,

¹⁷³ T Arnold, *The Symbols of Government* (1935); Waller, “The Antitrust Legacy of Thurman Arnold” (2004) 78 *St John’s LR* 569.

¹⁷⁴ For a useful fundamental review of the offence of conspiracy see Katyal, “Conspiracy Theory” (2003) 112 *Yale LJ* 1307.

many of which have been codified by the Criminal Code (Cth).¹⁷⁵ Other signs point in a similar direction:

- “conspiracy to fix prices” is how price fixing in breach of section 1 of the Sherman Act is typically described;
- the concept of “subverting competition” is often used by US DOJ officials as a descriptor for serious cartel conduct¹⁷⁶ and has been in general usage since at least the days of Adam Smith; and
- in England, a showcase prosecution has been launched against 9 individuals and 5 pharmaceutical companies for conspiracy to defraud by means of bid-rigging.¹⁷⁷

7. CONCLUSION: WHY DISHONESTY?

The main argument of this paper is that dishonesty is both unnecessary and unduly problematic as an element of the Cartel Offence. This is demonstrated by the possibility of an offence of Conspiracy to Subvert Competition or some other “No Dishonesty” offence, as outlined and as discussed in section 6. An offence such as the suggested Conspiracy to Subvert Competition would:

- project and capture the idea of “serious cartel conduct” by defining the mental and physical elements of the offence in ways that specifically reflect the seriousness of the offence - there is no need to add the metaphysical element of “dishonesty”;
- avoid the black hole of “standards of ordinary persons” by defining the physical elements of the cartel offence in relatively clear terms; and
- not allow defendants to exploit the excessive subjectivism of the *Ghost* test by generating their own self-preferring ways of denying that they knew that their conduct was dishonest - all exemptions and defences would be defined by law and not by defendants.

¹⁷⁵ As discussed in section 6.4, section 11 of the Criminal Code does not require a common intention on the part of all parties whereas section 4D does, and there is a good case for not following the Code provisions in this respect.

¹⁷⁶ See eg, US DOJ, *Preventing and Detecting Bid Rigging, Price Fixing, and Market Allocation in Post-Disaster Rebuilding Projects* (2005) 6. See also JW Hurst, *Law and Markets in United States History: Different Modes of Bargaining Among Interests* (1982) 75.

¹⁷⁷ See Furse & Nash, “A Rose by any Other Name” (2006) 156 New LJ 780. See generally Lever & Pike, “Cartel Agreements, Criminal Conspiracy and the Statutory ‘Cartel Offence’” [2005] ECLR 90, 164.

These points seem almost self-evident.

If dishonesty is retained as an element of the Cartel Offence in the forthcoming exposure draft Bill, the concept is likely to come under close scrutiny by the States and by politicians with SME constituencies.¹⁷⁸ I strongly doubt that dishonesty is capable of withstanding any such scrutiny. Curiously, the concept has not been justified in any detail by the Government publicly,¹⁷⁹ the Dawson Committee never recommended it,¹⁸⁰ and the report of the Working Party to the Government does not appear to have inspired enough confidence in the Government for it to be published. Moreover, it is puzzling why any government would choose to follow the inclusion of dishonesty as an element of the cartel offence in the Enterprise Act 2002 (UK) – no other country in the world has gone down that track, for many good reasons.

¹⁷⁸ See the discussion of inegalitarian bias in section 5.4.

¹⁷⁹ The Press Release is no substitute for a detailed report.

¹⁸⁰ *Review of the Competition Provisions of the Trade Practices Act (2003)* 155, 163-164.