

AVOIDANCE AND DENIAL OF LIABILITY FOR CARTEL CONDUCT

PROACTIVE LAWFUL ESCAPE ROUTES LEFT OPEN BY THE CARTEL LEGISLATION

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1. Introduction and summary

1.1 A reality check about the implications of the new cartel legislation

Cartel litigation and cartel investigation are likely to be shaped to a significant extent by what corporations and managers do proactively in response to the threat of criminal sanctions, civil penalties and liability for damages. It would be a mistake to assume that the prime targets of the new cartel legislation¹ – those competitors who cause multi-million dollar losses to consumer welfare by co-ordinating their conduct instead of competing against each other – will be sitting ducks waiting to be shot.

The new cartel offences and civil penalty prohibitions are intended to electrify the deterrence of cartel conduct. However, discussion of the implications for corporate and individual behaviour has been superficial and not always realistic. It is entirely possible that a direct effect will be to induce the more widespread use of anti-competitive methods of doing business that do not involve breaking the law. Corporations and their advisers are adept at managing the law in ways they believe will achieve their perceived interests as distinct from the interests of legislators and enforcement agencies.² This paper outlines some of the avenues open to corporations and their managers to avoid or deny liability by revising their liability control strategies and doing some re-engineering or personal training to implement those strategies.

Many lawful escape routes are open to those in the corporate sector who do not share the noble aspirations of those responsible for Australian anti-cartel laws. The escape routes are not risk-free but some conceivably can be made to work. They include:

Thanks are due to colleagues, especially Caron Beaton-Wells, for their comments on draft versions of this paper. Any errors, omissions or infelicities are mine alone.

¹ The amendments to the Trade Practices Act 1974 (Cth) ('TPA') proposed in Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008.

² See eg, N Shover & A Hochstetler, *Choosing White-Collar Crime* (Cambridge University Press, 2006); WS Laufer, *Corporate Bodies and Guilty Minds* (University of Chicago Press, 2006) ch 4; R Jackall, *Moral Mazes: The World of Corporate Managers* (1988); M Punch, *Dirty Business: Exploring Corporate Misconduct* (Sage, 1996); T Frankel, *Trust and Honesty: America's Business Culture at a Crossroad* (OUP, 2006); L Gettler, *Organisations Behaving Badly: A Greek Tragedy of Corporate Pathology* (Wiley, 2005); J Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable, 2004); K Mann, *Defending White-Collar Crime* (1985); E Rodrigues & M Stegemoller, 'Placebo Ethics', University of Georgia School of Law, Research Paper No. 09-003 (2009), at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1364220. Ambrose Bierce defined "corporation" as "an ingenious device for the maximisation of profit and the minimisation of responsibility" (*The Devil's Dictionary*). On the other side of the ledger, the modern corporation frequently transforms the external legal order into internal policies, rules, procedures and practices in ways that produce gains in deterrent impact, flexibility, efficiency and innovation; see eg C Parker, *The Open Corporation* (Cambridge University Press, 2002); GJ Seidel, *Using the Law for Competitive Advantage* (Jossey-Bass, 2002).

- using a suitable facilitating practice (eg a most-favoured-customer provision; a price-matching provision) that will have the likely effect of stabilising prices and making sure that there is a plausible business explanation for it – this approach does not require collusion and side-steps the criminal and civil per se prohibitions against cartel conduct – see section 3.2;
- if discussing anything sensitive with a competitor, taking precautions to steer clear of any expression or other evidence of “commitment” needed to arrive at a collusive arrangement or understanding – see section 3.3;
- flying a “JV Ultra-Light” (ie a joint venture formed partly for the purpose of achieving some minimal efficiencies but predominantly for the purpose of avoiding the application of the cartel offences and the new per se civil prohibitions) to co-ordinate conduct with a competitor – see section 3.4;
- cross-licensing intellectual property in such a way as to immunise a cartel provision – see section 3.5; and
- as a senior manager, using the age-old technique of getting lesser employees to do the dirty work without getting close enough oneself to have provable knowledge of personal participation (as illustrated by the “insulated conductor” model used by Ralph Cordiner, Chairman of General Electric, as a personal avenue of escape in the heavy electrical price fixing conspiracies in the US in the late 1950s and early 1960s) – see section 3.6.

Are the cartel offences and other cartel prohibitions likely to achieve the big bang hoped for by their most ardent supporters? This paper fears that the answer is “No”. However, much noise is to be expected from shells exploding against secondary or minor targets, and backfires.

1.2 Scope

This paper is an abbreviated account of several particular concerns about the cartel offences and the cartel legislation. The elements of the cartel offences and other aspects of the cartel legislation are discussed in more detail elsewhere.³

³ C Beaton-Wells and B Fisse, ‘The Cartel Offences: An Elemental Pathology’, paper presented at the Law Council of Australia and Federal Court of Australia joint workshop on cartel criminalisation, Adelaide, 4 April 2009; B Fisse, Submission to the Senate Economics Committee on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth), 20 January 2009, at: http://www.brentfisse.com/images/Brent_Fisse_Submission_to_Senate_Economics_Committee_on_Cartel_Bill_20_January_2009.pdf; C Beaton-Wells and B Fisse, ‘Criminalising Serious Cartel Conduct: Issues

1.3 Disclaimers

Nothing in this paper:

- (a) is to be taken as any kind of encouragement to act unlawfully – the possible escape routes discussed in sections 3.2-3.6 below are outlined on the explicit assumption that they do not involve unlawful conduct;
- (b) is legal advice – the discussion is general in nature and is not intended to be relied on as legal advice by anyone;
- (c) assesses the risks that need to be considered in any particular case;
- (d) represents the view of any client; or
- (e) promises anything.

2. Proactive responses of corporations and managers to the cartel offences and other per se prohibitions against cartel conduct - two models

Two possible models⁴ of how corporations and managers will decide to manage the cartel legislation are:

- (1) the Compliance Model (see section 2.1); and
- (2) the Rational Self-Interest Model (see section 2.2).

These Models are abstractions but may be useful as basic stress tests for thinking about compliance, liability control and escape routes. Both Models are reflected to varying degrees in many organisations.⁵

of Law and Policy', *Australian Business Law Review*, vol. 36, 2008, p. 166; B Fisse, 'Defining the Cartel Offences: Disaster Recovery', paper presented at Competition Law Conference, Sydney, 24 May 2008, at http://www.brentfisse.com/images/Fisse_Defining_the_Australian_Cartel_Offences_240608.pdf; B Fisse, 'The Cartel Offence: Dishonesty?', *Australian Business Law Review*, vol. 35, 2007, p. 235.

⁴ There are other possible models, including the Mafia Model (where the cartel legislation is the subject of organised and celebrated breach); the Behavioural Economics Model (which focuses on the psychological factors that govern or shape the conduct of organisations and those who act on their behalf); the Zombie Model (where the cartel legislation has no apparent influence other than stupefaction (the 44ZZ syndrome)); the Political System Model (one of many possible further models derivable from G Morgan, *Images of Organization* (Sage Publications, 1986)); and the Transformation Model (see D Papadopoulos, N Stephenson, & V Tsianos, *Escape Routes: Control and Subversion in the 21st Century* (2008)). On the diversity of models and their uses see PJH Schoemaker, 'Strategic Decisions in Organizations: Rational and Behavioural Views' (1993) 30 *Journal of Management Studies* 107.

2.1 The Compliance Model

The main features of the Compliance Model are well known. They are:

- a framework designed to achieve compliance with TPA prohibitions, which are taken to command and control the relevant behaviour of corporations and their employees;
- a trade practices compliance policy and compliance program based closely on AS 3806-2006 *Compliance Programs*;
- conservative rules and guidelines that manage the risk of non-compliance by steering well clear of potential trouble and encourage employees to ask the company's lawyers for guidance if ever in doubt;
- automatic or close adherence to guidance material issued by the ACCC and adoption of a co-operative stance towards the ACCC;
- willing acceptance of the need for authorisation by the ACCC as a solution in cases where there is a possible risk of breaching the TPA prohibitions against cartel conduct; and
- a positive attitude towards the legislation and its enforcers based on goodwill and trust.

The Compliance Model is proselytised by the ACCC,⁶ and often echoed by compliance professionals and law firms. The Compliance Model emanates from various public interest and

⁵ As reflected by the convergent approach outlined in B Fisse, 'Implementing an Efficient Compliance Program' (2003), at: http://www.brentfisse.com/images/Fisse_Implementing_an_Efficient_Compliance_Program.pdf. Contrast the concept of 'corporate culture', a loose notion that postulates a degree of homogeneity rarely encountered in organisations of sufficient size to occasion concern about their internal controls; see further G Morgan, *Images of Organization* (Sage Publications, 1986); L Smircich, 'Concepts of Culture and Organizational Analysis' (1983) 28 *Administrative Science Quarterly* 339; A Gordon, 'The Work of Corporate Culture: Diversity Management', *Social Text*, No. 44 (Autumn - Winter, 1995), p. 3. But compare *ASIC v Chemeq Limited* [2006] FCA 936 at [86] (defined narrow use of concept of corporate culture).

⁶ See especially ACCC, *Compliance and Enforcement Policy* (April 2009), at: <http://www.accc.gov.au/content/item.phtml?itemId=867964&nodeId=38f33e126b23258f0b320d83e4009709&fn=Compliance%20and%20enforcement%20policy.pdf>. The ACCC championed the development of the Australian standard on compliance programs and has published numerous papers and guides on compliance; see eg ACCC, *Corporate Trade Practices Compliance Programs* (2005), at: <http://www.accc.gov.au/content/item.phtml?itemId=717078&nodeId=0de4ca0a69fe9dde037bf81391b2cdab&fn=Corporate%20trade%20practices%20compliance%20programs.pdf>; ACCC, 'Trade Practices

other theories of regulation.⁷ Those theories are reflected by a vast literature on compliance programs and methods of achieving compliance with legislation.⁸ That literature also warns against the risk of non-compliance where the law and/or those who enforce it are not respected or trusted.⁹

The Compliance Model has little to say about possible escape routes from the cartel legislation: the general implication is that the cartel legislation is there to be complied with, not avoided. The Rational Self-Interest Model has different implications, as outlined below.

2.2 The Rational Self-Interest Model

The main features of the Rational Self-Interest Model are:

- a framework designed to control potential liability for breach of TPA prohibitions by looking beyond the narrow concept of “compliance” and addressing what needs to be done to optimise the rational self-interest of the corporation and/or its managers¹⁰ – rational self-interest governs, not the interests of lawmakers, enforcement agencies and their consorts;
- a trade practices policy and program that reflects the strategies, tactics and tools needed to optimise rational self-interest in a context where the TPA is a constraint to be managed, not worshipped, and where AS 3806-2006 *Compliance Programs* is of secondary relevance because it is geared to compliance, not liability control;

Compliance Programs’, at <http://www.accc.gov.au/content/index.phtml/itemId/54418>; J Martin, ‘Outstanding governance practices: Staying on top through a strong and vibrant Trade Practices compliance program’ (2008), at: <http://www.accc.gov.au/content/index.phtml/itemId/853920/fromItemId/8973>; D Smith, ‘The Regulator’s Approach to Compliance: Crackdown, Confrontation or Compliance Culture’ (2005), at: <http://www.accc.gov.au/content/item.phtml?itemId=685876&nodeId=493c91f85343c6f948d6bbcb5e511c1&fn=20050526%20ACI.pdf>. The ACCC is a world leader in this area.

⁷ See eg C Parker, *The Open Corporation* Cambridge University Press, 2002); K Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing, 2004); JA Sigler & JE Murphy, *Interactive Corporate Compliance: An Alternative to Regulatory Compulsion* (1988).

⁸ See eg, CCH, *Australian Trade Practices Compliance* (2009); American Bar Association, *Antitrust Compliance: Perspectives and Resources for Corporate Counselors* (2006); MT Biegelman & DR Biegelma, *Building a World-Class Compliance Program: Best Practices and Strategies for Success* (2008); Michael G. Silverman, *Compliance Management for Public, Private, or Non-Profit Organizations* (2008).

⁹ See eg, TR Tyler, ‘Trust and Law Abidingness: A Proactive Model of Social Regulation’ (2001) 81 Boston University LR 361.

¹⁰ See eg, B Fisse, ‘Corporate Compliance Programmes: The Trade Practices Act and Beyond’ (1989) 17 ABLR 356 at 358-369; B Fisse, ‘Implementing an Efficient Compliance Program’ (2003), at: http://www.brentfisse.com/images/Fisse_Implementing_an_Efficient_Compliance_Program.pdf.

- rules and guidelines that are designed to implement a corporation's strategic assessment of relevant risks, options and how best to manage the TPA in order to pursue rational self-interest – they do not kneel at the altar of the TPA;
- scepticism towards guidance material issued by the ACCC and a calculated and measured response towards co-operation with the ACCC – ACCC guidance material is not necessarily a guide to rational self-interest and the benefit or otherwise of co-operation with the ACCC needs to be assessed in each situation;
- authorisation by the ACCC is seen as a costly and bureaucratic solution that is to be avoided wherever possible after considering all potentially feasible escape routes;¹¹ and
- a questioning or critical attitude towards the legislation and enforcers based on refusal to tolerate significant legislative defects and concern about the dangers of bureaucratic empire-building, unfettered discretion, lack of commercial experience and humbug.

The Rational Self-Interest Model is one product of political theories of rational choice and economic theories of rational action.¹² Those theories have won Nobel prizes¹³ and are consumed globally as a golden elixir of corporate life. Their influence, good and bad, is apparent in many areas of regulation, including taxation.

¹¹ For a critique of the contention that the overbroad definition of the cartel offences does not matter because authorisation is possible see C Beaton-Wells and B Fisse, 'The Cartel Offences: An Elemental Pathology', paper presented at the Law Council of Australia and Federal Court of Australia joint workshop on cartel criminalisation, Adelaide, 4 April 2009, at 2.3.6:

'It has been contended that parties can and should apply for an authorisation in cases where the cartel offences suffer from over-reach or uncertainty. This contention is an unpersuasive response to those problems. Per se liability, especially criminal liability, warrants careful definition and should not extend to typical examples of harmless or pro-competitive conduct. The authorisation process does not provide any justification for inattentive definition of the elements of the cartel offences or the exceptions that apply to them. Authorisation is an inexpedient solution except in cases where there are anti-competitive effects and where public benefits may outweigh those effects. In other cases authorisation typically is impractical given the cost, delay, publicity and uncertainty of the process and the limited scope or period of immunity if authorisation is granted. Review of the authorisation process and possible ways of eliminating the need for authorisation is overdue. No equivalent process for regulating collaborations between competitors has been found necessary in the USA or the EU.'

¹² See eg, J Buchanan & G Tulloch, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, 1962); GS Becker, *The Economic Approach to Human Behavior* (University of Chicago Press, 1976).

¹³ Gary Becker (1992); James Buchanan (1986). Some Nobel prize winners have attacked rational action theory, eg Herbert Simon (1978) (bounded rationality); Daniel Kahneman & Vernon Smith (2002) (behavioural economics). See also A Etzioni, *The Moral Dimension: Toward a New Economics* (Free Press, 1988)

What are the implications of the Rational Self-Interest Model for the avoidance or denial of liability under the cartel legislation?

3. Implications of the Rational Self-Interest Model for avoidance or denial of liability

3.1 Scoping out the possible escape routes

The Rational Self-Interest Model, unlike the Compliance Model, impels consideration of the various potentially feasible escape routes that may be used to avoid or deny liability under the cartel legislation. The possible escape routes discussed here are fivefold:

- (1) using a facilitating practice that can sidestep the per se prohibitions against cartel conduct (see section 3.2);
- (2) if discussing anything sensitive with a competitor, taking precautions to steer clear of any expression of “commitment” (see section 3.3);
- (3) using a “JV Ultra-Light” to co-ordinate conduct with a competitor (see section 3.4);
- (4) deploying a cartel provision as a condition of the cross-licensing of intellectual property (see section 3.5); and
- (5) as a senior manager, getting lesser employees to do the dirty work without getting close enough oneself to have provable knowledge of personal participation – the “insulated conductor” stratagem (see section 3.6).

Routes (1) and (2) seek to avoid liability for the cartel offences, the civil per se prohibitions against cartel conduct and the civil per se prohibition against an exclusionary provision.

Route (3) seeks to avoid liability for the cartel offences and the civil per se prohibitions against cartel conduct. However, route (3) does not escape the potential application of:

- (a) the prohibition against exclusionary provisions (if the joint venture contract includes an exclusionary provision the defence under s 76C will be apply); or
- (b) the general prohibition under s 45 of the TPA against contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market.

Route (4) seeks to avoid liability for the cartel offences, the civil per se prohibitions against cartel conduct, the civil per se prohibition against an exclusionary provision, and the general prohibition under s 45(2) of the TPA against contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market. The underlying basis is that all of these prohibitions are subject to the exemption under s 51(3) of the TPA.

Route (5) seeks to avoid individual liability, whether as a principal or for complicity, in relation to the cartel offences, the civil per se prohibitions against cartel conduct, the civil per se prohibition against an exclusionary provision, and the general prohibition under s 45(2) of the TPA against contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market.

These possible escape routes do not envisage unlawful conduct but the rational ordering of affairs in accordance with legal obligations. There are of course many other possible escape routes that are unlawful, high-risk and/or very costly. The more blatant possibilities include lying to the ACCC, paying bribes or chartering a helicopter to escape from prison, or becoming insolvent to avoid paying fines or civil monetary penalties. No less obvious are the following lessons from the 2008 US antitrust trial of Gary Swanson for conspiring to fix the price of DRAM:¹⁴

- if you must sail close to the wind or engage in collusion, ensure that any written communications about a deal with a competitor are in a language that you don't understand (eg Japanese, Mandarin, C++) – inability to understand Korean was a helpful factor in Gary Swanson's successful defence;¹⁵ and
- if the worst happens, engage an expert economist who can portray what happened in the market, how market factors explain your conduct, and why you did not know or believe that there was any cartel provision – expert evidence by Jerry Hausman was one foundation of Gary Swanson's defence.¹⁶

If dishonesty were to be reinstated as an element of the cartel offences, further opportunities for denial of liability would be possible. Those opportunities would include denial of liability for

¹⁴ R Bunzel and H Miller, 'Defending 'The Last Man Standing': Trench Lessons from the 2008 Criminal Antitrust Trial *United Sates v Swanson*', *Antitrust Source*, June 2008, at <http://www.antitrustsource.com>,

¹⁵ R Bunzel and H Miller, 'Defending 'The Last Man Standing': Trench Lessons from the 2008 Criminal Antitrust Trial *United Sates v Swanson*', *Antitrust Source*, June 2008, at pp. 9-10, at <http://www.antitrustsource.com>

¹⁶ R Bunzel and H Miller, 'Defending 'The Last Man Standing': Trench Lessons from the 2008 Criminal Antitrust Trial *United Sates v Swanson*', *Antitrust Source*, June 2008, at p. 11, at <http://www.antitrustsource.com>

price fixing on the basis that the prices fixed were reasonable, not dishonest.¹⁷ Fortunately for the public interest, the element of dishonesty has been dead at least since its demise in the second exposure draft of the cartel legislation (October 2008).¹⁸

3.2 Facilitating practices as a means of side-stepping the per se prohibitions against cartel conduct

The most attractive possible escape route from the per se prohibitions against cartel conduct is to use a suitable facilitating practice.

A facilitating practice¹⁹ (sometimes referred to as “tacit collusion”) is a method of bringing about co-ordinated conduct by competitors without making a contract or arrangement or arriving at an understanding.²⁰

“In essence, it involves an activity, generally the provision or exchange of information in the market place, which makes coordination between competitors easier and more effective - easier because it facilitates communication, and more effective because it facilitates detection of cheating and administration of punishment for deviations. Such facilitation assists in overcoming the uncertainty associated with competition or the impediments to oligopolistic interdependence. Tacitly collusive or facilitating behaviour increases the likelihood of anti-competitive effects. However, it is recognised that such effects need not ensue - ‘the vice of a facilitating practice is its anti-competitive *tendency* rather than a proved anti-competitive *result* in the particular case.’

¹⁷ C Beaton-Wells and B Fisse, ‘Criminalising Serious Cartel Conduct: Issues of Law and Policy’, *Australian Business Law Review*, vol. 36, 2008, p. 166 at pp. 184-5.

¹⁸ Contrast the rise of a Phoenix imagined in D Neal, ‘Too many holes in bill to outlaw criminal cartels’, *The Age*, 1 May 2009.

¹⁹ See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Law & Business, New York, 2003, ¶1435c-¶1435i; GA Hay, ‘Facilitating Practices’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 50; RA Winter, ‘Price-Matching and Meeting Competition Guarantees’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 53; J Kattan, ‘Beyond Facilitating Practices: Price Signalling and Price Protection Clauses in the New Antitrust Environment’ *Antitrust Law Journal* vol. 63, 1994-1995, p. 133; SC Salop, ‘Practices that (Credibly) Facilitate Oligopoly Coordination’, in JE Stiglitz and GF Mathewson (eds), *New Developments in the Analysis of Market Structure*, MIT Press, Cambridge, Massachusetts, 1986, p. 271; I Ayres, ‘How Cartels Punish: A Structural Theory of Self-Enforcing Collusion,’ *Columbia Law Review*, vol. 87, 1987, p. 295; R Rees, ‘Tacit Collusion’ (1993) 9 *Oxford Review of Economic Policy* 27; D Gilo & A Porat, ‘The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers and Anticompetitive Effects’ (2006) 104 *Michigan LR* 983; R Smith, A Duke & DK Round, ‘Signalling, Collusion and Section 45 of the TPA’ (2009, forthcoming).

²⁰ C Beaton-Wells and B Fisse, ‘The Cartel Offences: An Elemental Pathology’, paper presented at the Law Council of Australia and Federal Court of Australia joint workshop on cartel criminalisation, Adelaide, 4 April 2009, s 3.2.

This concern is magnified by the difficulty in preventing or remedying the anti-competitive effects of oligopolistic interdependence as such.” [Footnotes omitted]

Facilitating practices proliferate in commerce in many forms and vary considerably in the extent to which they risk inference of an arrangement or understanding. A very common and typically low risk type of facilitating practice is a price protection or ‘most favoured customer’ clause (eg, guaranteeing a buyer that it will be charged no more than the supplier’s most favoured customer, or that competitor’s price will be matched or bettered).²¹

The use of a price protection or price-matching provision is unilateral in the sense that it can be implemented without any written or spoken communication directly with a competitor or indirectly via an intermediary used for that purpose.²² If implemented unilaterally, a price protection or price-matching provision is unlikely to give rise to a contract, arrangement or understanding with a competitor. By contrast, the same is not true of facilitating practices that involve some form of direct communication with a competitor (eg, sending a price list to a competitor).

The ACCC proposal for amendments to s 45 to water down the concept of an “understanding”²³ does not squarely or adequately address the use of facilitating practices.²⁴ Even if the ACCC’s proposal were to be adopted (which seems unlikely given the criticism that the proposal has received),²⁵ it is unlikely that the unilateral use of a price protection or price-matching provision would involve arriving at an understanding: for example, unlike the situation in cases such as *ACCC v Leahy Petroleum* (2007) FCR 321,²⁶ there would not be spoken or verbal communication with a competitor.

A greater risk would arise if the concept of a “concerted practice” under Article 81(1) of the EC Treaty were to be adopted in Australia as an element of the prohibitions against cartel

²¹ See RA Winter, ‘Price-Matching and Meeting Competition Guarantees’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 53.

²² “Communication” is a hydra-headed concept that ranges from two-way spoken discussion, to a written document sent to a second party, to signalling to others by making a unilateral announcement without making any spoken or written contact with another person. See further DW Carlton, RH Gertner and AM Rosenfield, ‘Communication Among Competitors: Game Theory and Antitrust’, *George Mason Law Review*, vol. 5, no. 3, 1997, p. 423; O Black, *Conceptual Foundations of Antitrust* (2005) ch 5-6.

²³ Australian Competition and Consumer Commission, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol*, December 2007, pp. 228–9, Appendix R, at <http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf>.

²⁴ C Beaton-Wells and B Fisse, ‘The Cartel Offences: An Elemental Pathology’, paper presented at the Law Council of Australia and Federal Court of Australia joint workshop on cartel criminalisation, Adelaide, 4 April 2009, s 3.

²⁵ See the submissions made to Treasury, at <http://www.treasury.gov.au/contentitem.asp?ContentID=1511&NavID=037>

²⁶ (2007) FCR 321. See also *Apco Service Stations Pty Ltd v ACCC* (2005) 159 FCR 452.

conduct.²⁷ This approach has been recommended for consideration in the context of the civil prohibitions against cartel conduct.²⁸

A concerted practice under Article 81(1) is:

“... a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.”²⁹

Mere parallel conduct is insufficient to constitute a concerted practice but a concerted practice can exist without spoken communication between competitors. There does not appear to be any case law specifically on price protection or price-matching provisions. However, in 2004, following a European Commission investigation, 6 Hollywood film studios voluntarily decided to withdraw MFN clauses from their contracts with a number of European pay-TV companies for television broadcasts of movies.³⁰ The pay-TV companies were obliged to give studios the benefit of better terms agreed with other film studios. The Commission regarded this obligation as anti-competitive because it led to very similar terms being agreed for the supply of films to pay-TV firms by all studios - terms which were not necessarily reflective of market forces. Two of 8 studios contested the EC's position and, although the media release at the time said that the investigation was continuing, that investigation appears to have lapsed without trace.

Those who wish to use a price protection or price-matching provision, or any other kind of facilitating practice, are well-advised to take precautions against the risk of an understanding being inferred from conduct. Two high-level observations may be made:

- it would be foolhardy to enter into any written or spoken communication about the use of a facilitating practice directly with a competitor or indirectly via an intermediary used for that purpose;³¹ and

²⁷ As discussed in J Faull and A Nikpay, *The EC Law of Competition*, Oxford University Press, Oxford, New York, 2007, [3.103]-[3.124]; D Snider and I Scher, ‘Conscious Parallelism or Conspiracy?’, in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 49, at pp. 1182-4.

²⁸ See C Beaton-Wells and B Fisse, ‘The Cartel Offences: An Elemental Pathology’, paper presented at the Law Council of Australia and Federal Court of Australia joint workshop on cartel criminalisation, Adelaide, 4 April 2009, s 3.3.2.

²⁹ *Imperial Chemical Industries Ltd v Commission* [1972] ECR 619 at [64].

³⁰ European Commission, ‘Commission closes investigation into contracts of six Hollywood studios with European pay-TVs’, IP/04/1314 Brussels, 26 October 2004.

³¹ One interesting practical question is the extent to which reliance may lawfully be placed on competitively relevant information gathered from other competitors by an ‘independent’ research company from whom the information is then acquired.

- it is highly advisable to avoid using a facilitating practice unless there is a sound business rationale for doing so – if there is such a rationale it will be extremely difficult or impossible for enforcers or plaintiffs to prove the existence of an arrangement or understanding.³²

Facilitating practices need not involve any contract, arrangement or understanding with a competitor. However, as is illustrated by the use of price protection and price-matching provisions, they may easily involve a contract, arrangement or understanding with a customer. If so, care is needed to avoid liability for breaching the general prohibition against a contract, arrangement or understanding, or an aggregation of contracts, arrangements or understandings, that has the purpose, effect or likely effect of substantially lessening competition in a market.³³ However, query how attractive litigation would be to protagonists.³⁴ In the particular context of a carefully considered and well-designed price protection or price-matching provision:

- (a) it would be difficult to prove that the likely effect of such a provision was to substantially lessen rather than to enhance competition in a market; and
- (b) a cogent documented business rationale would be likely to defeat an allegation that the *purpose* of the provision was to substantially lessen competition in a market.

If a corporation has market power, care will be needed to guard against the risk of liability under s 46 for misuse of market power by taking precautions of the kind necessary to minimise the risk of breaching the general prohibition against a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition in a market.³⁵

³² See GA Hay, 'Facilitating Practices', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 50, pp. 1207-8, 1216-7; S Hendrick & C Penhallurick, 'Most Favoured Nations Clauses – Bane or Boon?' (2004) 12 TPLJ 78 at pp. 87-8.

³³ TPA, s 45(2)(4). See further S Hendrick & C Penhallurick, 'Most Favoured Nations Clauses – Bane of Boon?' (2004) 12 TPLJ 78.

³⁴ Attempts in the USA to establish liability on the basis of facilitating practices usually have run into considerable difficulty; see GA Hay, 'Facilitating Practices', in ABA Section of Antitrust Law, *Issues in Competition Law and Policy Vol II*, ABA Book Publishing, Chicago, 2008, ch. 50, at pp. 1208-16.

³⁵ See further S Hendrick & C Penhallurick, 'Most Favoured Nations Clauses – Bane or Boon?' (2004) 12 TPLJ 78 at pp. 87-8. Contrast the unsophisticated and silly breach of s 46 in *ACCC v Australian Safeway Stores Pty Ltd* (2003) 198 ALR 657

3.3 The element of commitment as an avenue for avoiding or denying liability for breach of a per se prohibition against cartel conduct

In *Apco Service Stations Pty Ltd v ACCC*³⁶ and *ACCC v Leahy Petroleum Pty Ltd*³⁷ it was held that commitment by a party to a particular course of action or inaction is necessary to establish an ‘understanding’ within the meaning of section 45(2); whereas an expectation, and even less a hope, that the party will act or not act will fall short of an ‘understanding.’³⁸ In both instances, the ACCC’s case failed because the Commission failed to prove the requisite commitment. Concerned about the implications of these cases for its ability to prove anti-competitive collusion, the Commission has recommended amendments said to be intended, amongst other things, to provide statutory clarification that an ‘understanding’ may exist ‘notwithstanding that the party in question cannot be shown to be committed to giving effect to it.’³⁹

Under the law as stated and applied in *Apco Service Stations Pty Ltd v ACCC*⁴⁰ and *ACCC v Leahy Petroleum Pty Ltd*, a competitor is on safe ground if it steers clear of entering into any commitment with another competitor to fix prices or otherwise engage in cartel conduct. Hard-nosed corporations and their advisers will have annotated their copies of the TPA with a note along these lines:

If discussing anything sensitive with a competitor, always express a reservation to the effect that you will be making up your own mind about what you will be doing. (If you want to be cheeky, you can say that you expect to follow what the other competitor has proposed but always add that you have yet to make your own independent decision.) Make sure that there is a suitable file note and remember at all times that your telephone may be tapped. It is also best to make sure that your conduct after the discussion includes some random departures from parallel conduct.

This hard-nosed “Do not commit” approach is open under the current interpretation of the element of an “understanding”.⁴¹ The same approach would be inadvisable if the ACCC’s

³⁶ (2005) 159 FCR 452.

³⁷ (2007) FCR 321.

³⁸ *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452, 464 [47]; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321, 335 [37].

³⁹ Australian Competition and Consumer Commission, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol*, December 2007, pp. 228–9, Appendix R, at <http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf>, last viewed 11 March 2009.

⁴⁰ (2005) 159 FCR 452.

⁴¹ The problem is well recognised by the ACCC and has been emphasised publicly: see ‘Cartels thriving on loopholes: ACCC’, *Australian Financial Review*, 14 April 2009 p. 8.

proposed amendments to s 45 were to be adopted but the escape route would not be entirely removed. The amendments proposed by the ACCC are opaque and do not re-define what is meant by the term “understanding”.⁴² Moreover, an expectation is not defined as sufficient to amount to an understanding but is a factor to be taken into account. However, even if an expectation were sufficient to amount to an understanding, that would not prevent avoidance of liability. Remove the parenthetical comment in the note set out above. The approach would then be not merely “Do not commit” but “Do not commit and do not indicate any expectation”. This “Do not commit and do not indicate any expectation” approach would not be optimal as a means of trying to induce co-ordination. Nor would it be risk-free. However, it would exist as a potential way of numbing the tentacles of the ACCC’s proposed amendments.

The ACCC’s proposed amendments to the element of an understanding may be meant to apply to not only the civil prohibitions under s 45 of the TPA and the cartel legislation but also the cartel offences.⁴³ However, even if the proposed amendments were to be adopted for the cartel offences, the offence of arriving at an understanding that contains a cartel provision would require proof of *intention* to arrive at the understanding alleged. This subjective fault element of the cartel offence is more demanding to prove than the objective indicia that suffice for proof of an understanding in the context of the civil prohibitions.⁴⁴

The discussion above relates to the position under the TPA. Different considerations apply in NZ, the USA, the EU and other jurisdictions.⁴⁵

⁴² A failing criticised in I Tonking, ‘Belling the CAU: Finding a substitute for ‘understandings’ about Price’, *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46 at p. 65; I Wylie, ‘Understanding ‘understandings’ under the Trade Practices Act – an enforcement abyss?’, *Trade Practices Law Journal*, vol. 16, 2008, p. 20 at pp 35-6.

⁴³ The discussion paper released by Treasury on the element of an understanding refers to the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 in a footnote as if the proposal is relevant to the cartel offences but fails to discuss this important issue. On the need for caution before extending any relaxed concept of understanding to the cartel offences, see C Beaton-Wells and B Fisse, ‘The Cartel Offences: An Elemental Pathology’, paper presented at the Law Council of Australia and Federal Court of Australia joint workshop on cartel criminalisation, Adelaide, 4 April 2009, s 3.4.2.

⁴⁴ On the objective indicia of an arrangement or understanding that apply in the context of a civil prohibition against price fixing, see: *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 at [22]-[25]; DW McLauchlan, ‘Objectivity in Contract’ (2005) 24 University of Queensland LJ 479. The list of factors under the ACCC proposal apply only to the element of understanding – they do not apply to the requirement of intention for the cartel offences, see C Beaton-Wells and B Fisse, ‘The Cartel Offences: An Elemental Pathology’, paper presented at the Law Council of Australia and Federal Court of Australia joint workshop on cartel criminalisation, Adelaide, 4 April 2009, s 3.4.2. The ACCC list of factors could not be extended to the requirement of intention without radically qualifying and undermining that fault requirement.

⁴⁵ See I Tonking, ‘Belling the CAU: Finding a substitute for ‘understandings’ about Price’, *Competition & Consumer Law Journal*, vol. 16, 2008, p. 46; I Wylie, ‘Understanding ‘understandings’ under the Trade Practices Act – an enforcement abyss?’, *Trade Practices Law Journal*, vol. 16, 2008, p. 20; C Beaton-Wells and B Fisse, ‘The Cartel Offences: An Elemental Pathology’, paper presented at the Law Council of Australia and Federal Court of Australia joint workshop on cartel criminalisation, Adelaide, 4 April 2009, s 3.3.2.

3.4 The “JV Ultra-light” as a means of avoiding or denying liability for breach of a per se prohibition against cartel conduct

Another possible escape route is to use a “JV Ultra-Light” (ie a joint venture formed partly for the purpose of achieving some efficiencies but predominantly for the purpose of avoiding the application of per se prohibitions against cartel conduct).⁴⁶

The wording “for the purposes of a joint venture” in the joint venture exceptions under ss 44ZZRO and 44ZZRP is obscure. There is no explicit requirement that the provision be for the “sole or dominant purposes” of a joint venture; it may be sufficient that the provision is *substantially* for the purposes of a joint venture. This laxity opens the way for competitors to use “Mickey Mouse” joint venture contracts to get around the per se prohibitions against cartel conduct.⁴⁷

Assume that ACO and BCO, two of 15 transport companies that compete against each other in Victoria and NSW, enter into an unincorporated joint venture to “rationalise” their operations. Under the joint venture contract, ACO and BCO continue to use their transport systems but adopt a joint administration system. All customer orders and accounts are handled by the joint administration system which also looks after logistical arrangements for the transport of freight. Customer orders are allocated by an operations manager either to ACO or to BCO depending on the location of their warehouses and other facilities. The joint venture contract guarantees each of them at least 40% of the total business handled by the joint venture. The parties agree not to compete against each other inside or outside the joint venture. The customer allocation and non-compete provisions in the joint venture contract are cartel provisions (under s 44ZZRD(3)(a) and (b)). Two substantial purposes of the cartel provisions are: (1) to achieve some modest cost savings by using a common administration system; and (2) to lock the parties into the joint venture arrangement necessary to achieve those cost savings. However, the dominant purpose of the cartel provisions is to lessen competition between ACO and BCO by reducing the competition that has previously existed between them.

It is difficult to find any compelling policy justification for exempting a cartel provision from per se prohibition in the case of a JV Ultra-Light arrangement of the kind illustrated. However,

⁴⁶ The concept of a JV Ultra-Light is examined critically in B Fisse, Submission to the Senate Economics Committee on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth), 20 January 2009, Part 5, at: http://www.brentfisse.com/images/Brent_Fisse_Submission_to_Senate_Economics_Committee_on_Cartel_Bill_20_January_2009.pdf;

⁴⁷ Contrast the approaches adopted under US antitrust law and Canadian competition law: see FTC/DOJ, *Antitrust Guidelines for Collaborations Among Competitors* (2000); Canada Competition Bureau, *Competitor Collaboration Guidelines* (draft, 2009).

the joint venture exceptions under ss 44ZZRO and 44ZZRP do not appear to preclude the use of JV Ultra-Lights:

- the cartel provision in question is in a contract, as required under s 44ZZRO and s 44ZZRP;
- the joint venture is a “joint venture” within the ordinary language meaning of that term (the venture is an association for mutual profit - *United Dominions Corporation Limited v Brian Proprietary Limited*⁴⁸) and within the definition in s 4J (the venture is an activity in trade or commerce carried on jointly by two or more persons);
- the joint venture is for the supply of goods or services within the meaning of s 44ZZRO(1)(b) and s 44ZZRP(1)(b);
- the joint venture is carried on jointly by the parties to the contract as required under s 44ZZRO(1)(c) and s 44ZZRP(1)(c); and
- the cartel provisions appear to be “for the purposes of a joint venture”:
 - ≈ the provisions are related to and further the joint venture;
 - ≈ the provisions are not solely for purposes other than the purpose of the joint venture: the provisions are for substantial purposes of the joint venture (to achieve cost savings by using a common integrated system for some of the work and to lock the parties into the joint venture arrangement necessary to achieve those cost savings); and
 - ≈ the wording of s 44ZZRO(1)(a) and s 44ZZRP(1)(a) does not say: “for the purposes of a joint venture and not for any other purpose”; “for the purposes of a joint venture and not for the purpose of lessening competition between the parties to the joint venture;” or “for the purposes of a joint venture and not for the dominant purpose of lessening competition between the parties to the joint venture.”

The JV Ultra-Light escape route is subject to three major potential risks:

⁴⁸ (1985) 157 CLR 1 at 10.

- attempts are likely to be made by enforcers and plaintiffs to qualify the operation of s 44ZZRO(1)(a) and s 44ZZRP(1)(a) by in effect redrafting the provisions to read: “primarily or dominantly for the purposes of a joint venture” and it could take years of litigation to settle the question of interpretation;⁴⁹
- if the provision in question is an exclusionary provision the prohibition against exclusionary provisions will apply and the defendant will be put to proof under s 76C that the exclusionary provisions did not have the purpose or likely effect of substantially lessening competition in a market; and
- the general prohibition under s 45(2) against agreements that have the purpose, effect or likely effect of substantially lessening competition in a market will be in play.

Using a JV Ultra-Light is therefore unlikely to appeal to the faint-hearted. This is especially so given the uncertain reach of the substantial lessening of competition test.⁵⁰ In some situations, particularly those where the joint venture parties would otherwise be major competitors, the risk of liability under s 45(2) may be inevitable.

It should be noticed that the recent ACCC guide, *Cartels: Detection and Deterrence: A Guide for Government Procurement Officers* (2009) does not explore the ways in which a joint venture can be used in an attempt to mask a cartel. The Guide refers briefly to “certain joint ventures” and “certain joint venture arrangements” without explaining exactly what kinds of joint bidding or other collaborative arrangements should or should not pass scrutiny.⁵¹ Unless the Guide is revised in this respect, government departments would be well advised to fill the vacuum by developing their own analyses of acceptable and unacceptable joint venture

⁴⁹ The provisions are ambiguous and, since the provisions are penal, the ambiguity should be resolved in favour of defendants: see *Murphy v Farmer* (1988) 165 CLR 19; *Chew v The Queen* (1992) 7 ACSR 481; *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J); *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129, 145 (Mason, Deane and Dawson JJ); *Waugh v Kippen* (1986) 160 CLR 156, 164–5 (Gibbs CJ, Mason, Wilson and Dawson JJ); *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] FCA 826, [45]–[48]. However, purposive interpretation can trump the canon of interpretation that ambiguity in penal provisions is to be resolved in favour of defendants, and it is uncertain but possible that the joint venture exceptions could be so interpreted.

⁵⁰ A ‘substantial’ lessening of competition is said to be a lessening of competition that is ‘meaningful or relevant to the competitive process’: *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 71 per Gummow, Hayne and Heydon JJ.

⁵¹ At p. 17. Contrast eg GL Albano, G Spagnolo & M Zanza, ‘Regulating Joint Bidding in Public Procurement’ (2009) 5 *Journal of Competition Law & Economics* 335.

arrangements and by strengthening their protective measures accordingly (eg, the brief discussion in the Guide of warranties by bidders is inadequate).⁵²

3.5 Cross-licensing of intellectual property as an avenue for avoiding or denying liability for breach of prohibitions against cartel conduct

The use by competitors of intellectual property licensing arrangements for anti-competitive purposes has been a hot topic in the USA for many years⁵³ but remains a Cinderella subject in Australia.⁵⁴ The cross-licensing escape route created by s 51(3) of the TPA still survives.

As a starting point, consider the following discussion of cross-licensing and pooling arrangements in DOJ/FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* (1995):⁵⁵

“Cross-licensing and pooling arrangements are agreements of two or more owners of different items of intellectual property to license one another or third parties. These arrangements may provide procompetitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation. By promoting the dissemination of technology, cross-licensing and pooling arrangements are often procompetitive.

Cross-licensing and pooling arrangements can have anticompetitive effects in certain circumstances. For example, collective price or output restraints in pooling arrangements, such as the joint marketing of pooled intellectual property rights with collective price setting or coordinated output restrictions, may be deemed unlawful if they do not contribute to an efficiency-enhancing integration of economic activity among the participants. *Compare NCAA* 468 U.S. at 114 (output restriction on college football broadcasting held unlawful because it was not reasonably related to any purported justification) *with Broadcast Music*, 441 U.S. at 23 (blanket license for music copyrights found not per se illegal because the cooperative price was necessary to the

⁵² ACCC, *Cartels: Detection and Deterrence: A Guide for Government Procurement Officers* (2009), Purchaser’s checklist, Tender clause 3 – warranty.

⁵³ See DOJ/FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* (1995). The literature is vast and sophisticated; see eg, JG Sidak, ‘Patent Holdup and Oligopsonistic Collusion in Standard-Setting Organizations’ (2009) 5 *Journal of Competition Law & Economics* 123.

⁵⁴ See the very limited discussion in National Competition Council, *Review of Sections 51(2) and 51(3) of the Trade Practices Act* (Final Report 1999); s C5.1 (failure to discuss application of s 51(3) to price fixing and exclusionary provisions); Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (Final Report, 2000) (Ergas Committee Report) (brief comment in fn 431 p. 212: ‘Moreover, other practices, such as pooling and joint pricing among potentially competing rights-owners of similar patents, clearly have the potential to act as conduits for horizontal price fixing’).

⁵⁵ At [28].

creation of a new product). When cross-licensing or pooling arrangements are mechanisms to accomplish naked price fixing or market division, they are subject to challenge under the per se rule. See *United States v New Wrinkle, Inc*, 342 US 371 (1952) (price fixing).”

Assume that A and B are competitors and that each owns commercially significant patents. A licenses its patents to B for exclusive use in territory X. B licenses its patents to A for exclusive use in territory Y. An effect of this cross-licensing is that A and B do not compete against each other in territory X or territory Y but there is no non-compete clause in the licensing agreements. If carefully structured, this kind of arrangement can attract the exemption under s 51(3). A territorial restriction of the kind envisaged comes within the likely meaning of the requirement that the licensing condition must “relate to” “the invention to which the patent ... relates or articles made by the use of that invention”.⁵⁶ The exemption under s 51(3) is not precluded by the fact that A and B are competitors or likely competitors.⁵⁷ In the example given, there is no non-compete clause: the only cartel provision is that embodied in the licensing condition that each party has imposed on the other.

An advantage of this possible escape route is that the exemption under s 51(3) is not limited to the cartel offences or other per se prohibitions against cartel conduct but extends to the general prohibition against contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market. In 2000, the Ergas Committee recommended that intellectual property licensing agreements be subject to a competition test.⁵⁸ The Government’s Response in August 2001 heralded that it would amend section 51(3) and introduce a competition test.⁵⁹ However, no amendment has been made and s 51(3) appears to have dropped off the legislative reform agenda.⁶⁰

The cross-licensing escape route is narrow, partly because it is limited to the particular intellectual property conditions covered by s 51(3), and partly because it depends on the availability of intellectual property that is valuable enough to serve as a fulcrum point for

⁵⁶ See S Corones, *Competition Law in Australia* (4th ed, 2007) pp 574-575.

⁵⁷ As accepted in National Competition Council, *Review of Sections 51(2) and 51(3) of the Trade Practices Act* (Final Report 1999) p. 202.

⁵⁸ *Review of Intellectual Property Legislation and the Competition Principles Agreement* (2009) p. 215, at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(765F1D0B5FA9A829C7FDA9B7F9E8611A\)~Review+of+intellectual+property+legislation+under+the+Competition+Principles+Agreement,++\(September+2000\).pdf/\\$file/Review+of+intellectual+property+legislation+under+the+Competition+Principles+Agreement,++\(September+2000\).pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(765F1D0B5FA9A829C7FDA9B7F9E8611A)~Review+of+intellectual+property+legislation+under+the+Competition+Principles+Agreement,++(September+2000).pdf/$file/Review+of+intellectual+property+legislation+under+the+Competition+Principles+Agreement,++(September+2000).pdf)

⁵⁹ At: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~Govt+Response+IPCR.pdf/\\$file/GovtResponse+IPCR.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~Govt+Response+IPCR.pdf/$file/GovtResponse+IPCR.pdf)

⁶⁰ One possible explanation is that the Ergas Committee’s recommendation and the Government’s response were flawed beyond politically acceptable repair: see I Eagles & L Longdin, ‘Competition in Information and Computer Technology Markets: Intellectual Property Licensing and s 51(3) of the Trade Practices Act’ (2003) 3 QUTLJ 31.

market sharing, reduction of output or controlling the ultimate price of products. This escape route is also subject to a trap into which it is easy for commercial agreements to fall: the escape attempt will fail if, in addition to the cross-licensing of relevant intellectual property, there is a separate arrangement or understanding that contains a cartel provision (eg a clause imposing an obligation not to compete in particular areas or in other particular ways).

3.6 The “insulated conductor” stratagem for avoiding or denying individual liability for breach of prohibitions against cartel conduct

Senior management will often have an escape route from individual liability if they follow the “insulated conductor” stratagem successfully adopted by Ralph Cordiner, Chairman of General Electric, in the heavy electrical equipment cases in the USA in the late 1950s and early 1960s.⁶¹ This stratagem is simple:

- (1) keep at a distance from anything that could be a cartel provision and organise the relevant activity so that other employees do all the hands-on work – this will reduce the risk of you being found to have knowledge or a ‘belief’ that there is a cartel provision;
- (2) never say or do anything that openly encourages anyone to commit a cartel offence – rely on the law of anticipated reactions⁶² to impart motivation;
- (3) make sure that your corporation has a clear formal compliance policy that contains a stern warning of internal disciplinary action in the event of breach, and take disciplinary action against those employees who get caught and thereby fail to pass the test of fitness for the job.

During the 1950s, demand for large-scale power transformers, turbine generators, and other heavy electrical items in the USA dropped heavily. The two giants in the industry, The General Electric Company and Westinghouse Electric Corporation, found themselves under pressure to fix prices and succumbed. In a plot worthy of Elmore Leonard, sales representatives from General Electric and their US competitors met in secret and agreed to a "phase of the moon" scheme under which bids were submitted in accordance with a pre-arranged code. When the scheme was discovered, a federal grand jury in Philadelphia was empanelled to make a full inquiry. Of 20 indictments returned, 19 named General Electric as a co-conspirator.

⁶¹ See RA Smith, *Corporations In Crisis* (1966) chs 5-6; G Geis, ‘The Heavy Electrical Equipment Cases of 1961’ in G Geis & R Meier, eds, *White Collar Crime* (1977) 117-132; B Fisse & J Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983) ch 16.

⁶² H Simon, *Administrative Behavior* (1957) p. 130.

General Electric pleaded guilty in relation to seven "flagrant" conspiracies and *nolo contendere* in relation to the remaining 12. The company was fined \$437,500. 15 of its executives were fined and three were sent to jail, including William S. Ginn, a vice-president, who was fined \$12,500 and jailed for 30 days. Other co-conspirators, including Westinghouse and several of its personnel, were also punished for their roles. In all, fines of \$1,924,500 were imposed on 29 companies and 44 of their executives, and 7 persons were jailed for 30 days each.

Indictments were not brought against Ralph Cordiner, Chairman of General Electric, or other General Electric senior executives apart from William S Ginn. They denied knowledge of the price fixing conspiracies and blamed the sales representatives for violating Policy Directive 20.5, General Electric's antitrust policy. Their denials withstood investigation by the US DOJ and an extensive inquiry by the US Senate.⁶³ Many were sceptical, including Judge Ganey when imposing sentences on those who were caught:⁶⁴

“The real blame is to be laid at the doorstep of the corporate defendants and those who guide and direct their policy. While the Department of Justice has acknowledged that they were unable to uncover probative evidence which would secure a conviction beyond a reasonable doubt of those in the highest echelons of the corporations here involved, in a broader sense they bear a grave responsibility; for one would be most naive indeed to believe that these violations of the law, so long persisted in, affecting so large a segment of the industry, and, finally, involving so many millions upon millions of dollars, were facts unknown to those responsible for the corporation and its conduct.”

The insulation of senior managers from liability is a well-known phenomenon of organisational behaviour, at least in larger organisations.⁶⁵ Alan Dershowitz's examination of the heavy electrical conspiracy cases is particularly telling:⁶⁶

In the case of the small closely held corporation, where, in effect, the 'principal officer' is frequently indistinguishable from the corporation, the government has little difficulty pinpointing the actual formulators and agents of the criminal policy. In the endocratic corporation [ie large corporation], however, although few doubt that many acquisitive crime decisions are in some way formulated, or at least ratified, by the top management

⁶³ US Senate, Administered Prices, Pts 27 & 28, Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, 87th Cong., 2nd Sess., 1961.

⁶⁴ NY Times, 7 Feb 1961, p. 26.

⁶⁵ See eg, B Fisse and J Braithwaite, *Corporations, Crime and Accountability*, Cambridge University Press, Melbourne, 1993, pp. 39–40; WS Laufer, *Corporate Bodies and Guilty Minds* (University of Chicago Press, 2006) pp. 125-6; *ACCC v Leahy Petroleum (No 3)* (2005) 215 ALR 281 at [86]. On the role of lawyers, see WH Simon, 'Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct' (2005) 22 Yale Journal on Regulation 1.

⁶⁶ AM Dershowitz, 'Increasing Community Control over Corporate Crime: A problem in the Law of Sanctions' (1961) 71 Yale LJ 280 at pp. 292-3, 297

officials, it is difficult if not impossible to pinpoint guilt above the level of those who carry out the necessary overt acts. ...

The major difficulty is *not* the leniency with which available sanctions are imposed upon *convicted* corporate officials; it is the *inability to convict* true policy formulators at the highest echelons of endocratic corporate life. This is partially attributable to the ease with which oral communications may be kept secret, and the difficulty the state has in proving that which only the participants know - who in the chain of command formulated, as distinguished from implemented, the policy. The problem of isolating true formulators is even more difficult if what corporate sociologists call the ‘rule of anticipated reactions’ is indeed true. One writer has declared that, in the absence of any overt communication:

the subordinate may, and is expected to, ask himself "how would my superior wish me to behave under these circumstances?" Under such circumstances, authority is implemented by a subsequent review of completed action, rather than a prior command. Further, the more obedient the subordinate, the less tangible will be the evidence of authority. For authority will need to be exercised only to reverse an incorrect decision.

The difficulty of proving the existence and operation of such authority is a basic and inherent problem within the present system, and this problem would be alleviated but slightly by imposing more frequent or more severe penalties upon those whom the system is capable of convicting — the policy implementators.” [emphasis as in original]

The Australian cartel legislation is prone to the use of the “insulated conductor” stratagem for avoiding or denying individual liability. Competing captains of industry will not always be brazen enough to put in personal appearances at the All Nations Hotel, the Cartel Bar or any other incubator for hatching price fixing or market sharing conspiracies. More typically, the brunt of prosecution is likely to be borne by managers further down the line, as illustrated by the fate of Bruce McCaffrey, the scapegoat who went to jail in the USA for what he did for Qantas in the air cargo cartel.⁶⁷

Individual liability for a cartel offence or a civil prohibition as a principal requires the defendant personally to perform the relevant physical conduct and, in the case of a cartel offence, to act with the type of fault prescribed as the fault element. These requirements limit the scope of liability considerably and do not prevent big fish from swimming through the net:

⁶⁷ See ‘Ex-Qantas freight chief pays heavy price for cartel’, Sydney Morning Herald, 4 May 2009, p 24.

- Adroit managers will try to avoid performing the personal conduct necessary to constitute the *making* of a contract or arrangement or the *arriving at* of an understanding or the *giving effect to* of a cartel provision. Note that liability does not extend to *authorisation* of another person to make a contract or arrangement or to arrive at an understanding.⁶⁸ Moreover, an executive is not an employer or principal and hence is not subject to vicarious responsibility under s 84(3) for the conduct of an employee or agent.
- Even if a senior manager made the relevant contract or arrangement or arrived at the understanding, liability for the cartel offence requires knowledge or belief that the contract, arrangement or understanding contained a cartel provision. Proof of such knowledge or belief may be difficult or impossible where the accused has delegated the tasks that have given rise to the alleged cartel provision. An executive is not an employer or principal and hence is not subject to vicarious responsibility under s 84(4) for the state of mind of an employee or agent.

Individual liability for a cartel offence or a civil prohibition on the basis of complicity is possible on the basis of an omission to intervene⁶⁹ but will require personal fault. For example, liability for aiding or abetting will require intentional assistance or encouragement and knowledge or belief as to the essential matters constituting the cartel offence or the breach of a civil prohibition.⁷⁰ Senior managers who adopt and implement the “insulated conductor” stratagem will deny that their conduct was intended to assist or encourage any breach of the law or that they had knowledge or belief of the relevant essential matters.

⁶⁸ By contrast, the words ‘give effect to’ in s 44ZZRG(1) may extend to the authorisation of another person to do something by way of implementation of a cartel provision. Under s 4 of the TPA the words ‘give effect to’ include ‘do an act or thing in pursuance of or in accordance with’ a provision. Authorisation is an ‘act’ within the meaning of section 4. Authorisation of the implementation of a cartel provision appears to be an act in pursuance of or in accordance with the provision but the contrary is arguable.

⁶⁹ See *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805, 826; *Ashbury v Reid* [1961] WAR 49, 51; *Re: Adams v Anthony Bryant & Co Pty Ltd* [1987] FCA 130, [19] (pleas of guilty to charge of being knowingly concerned by omission in misleading representations on the basis of omitting to procure the company to take steps to prevent sales representatives from making misleading representations); AP Simester and WJ Brookbranks, *Principles of Criminal Law*, 3rd ed, Brooker’s, Wellington, NZ, 2007, 6.4.3; AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine*, 3rd ed, Hart Publishing, Oxford, 2007, p. 204; S Bronitt and B McSherry, *Principles of Criminal Law*, 2nd ed, Thomson Lawbook, Pyrmont, NSW, 2005, p. 350. Contrast *ACCC v Universal Music (Australia) Pty Limited* [2001] FCA 1800, [523]-[524]: Hill J found that there was no liability for being knowingly concerned in a contravention in circumstances where there might be liability under eg Williams J’s formulation of the law in *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805, 826. However, Hill J’s finding is of little weight as a precedent because the issue of complicity by omission was discussed without due reference to relevant authorities.

⁷⁰ *Giorgianni v R* (1985) 156 CLR 473, 506 (Wilson, Deane and Dawson JJ).

The opportunity that senior managers often have to serve as “shut-eyed sentries”⁷¹ and thereby insulate themselves from criminal or civil liability presents a difficult challenge to the legal order:

- Personal liability as a principal could be extended to cover the authorisation or the causing of cartel conduct. Under s 1 of the *Sherman Act*, a corporate executive is liable “whenever he knowingly participates in effecting the illegal contract, combination or conspiracy – be he one who authorizes, orders or helps perpetrate the crime”⁷² The cartel offence under s 188(1) of the *Enterprise Act 2002* (UK) applies to an individual who “makes or implements, or causes to be made or implemented” a cartel agreement.⁷³ Compare s 101 of the *Copyright Act 1968* (Cth), which makes authorisation is an explicit basis of liability for infringement of copyright.⁷⁴ However, none of these approaches is broad enough to catch reliance on the insulated conductor stratagem - none overcomes the problem of proving the fault element of knowledge or belief against someone who, like Ralph Cordiner, takes care to insulate themselves against the shock of discovery of unlawful conduct on the part of inferiors.
- Another possible option would be to extend vicarious responsibility to corporate officers, subject to a defence of reasonable precautions.⁷⁵ However, such an approach is inconsistent with the orthodox general principle that serious offences require personal subjective fault and is unlikely to be adopted. In any event, those who use the insulated conductor stratagem carefully would have some prospect of being able to rely successfully on a defence of reasonable precautions.

⁷¹ See further JC Coffee, Jr, ‘Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response’ (1977) 63 *Virginia LR* 1069 at 1106-7.

⁷² *US v Wise*, 370 US 405 (1962).

⁷³ The concept under s 188(1) of *causing* a contract or arrangement to be made, an understanding to be arrived at, or a cartel provision to be given effect to is narrower than the concept of authorisation: see HLA Hart and T Honore, *Causation in the Law*, 2nd ed, Clarendon Press, Oxford, 1985, pp. 367, 372–3. A liability rule requiring causation *or* authorisation would help to avoid getting bogged down in technical arguments about the meaning of ‘cause’.

⁷⁴ See further *University of New South Wales v Moorhouse* (1975) 133 CLR 1, 12. Authorisation does not necessarily require direct or positive acts and may be inferred (‘indifference, exhibited by acts of commission or omission, may reach a degree from which authorization or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorized . . .’) ((1975) 133 CLR 1, 21).

⁷⁵ Contrast the models of extended liability advanced in: Australian Law Reform Commission, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*, Report 95 (2002) pp. 316–35; Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault* (2006) p. 53.

- The threat of criminal or civil corporate liability, including the possibility of corporate penalties being increased as a result of negligent inaction by senior management,⁷⁶ may discourage resort to the insulated conductor stratagem, hopefully in many cases. However, those deterrent mechanisms work indirectly and are complements, not substitutes, for the imposition of individual responsibility.

4. Concluding perspectives on the new cartel legislation

Are the cartel offences likely to achieve the big bang hoped for by their most ardent supporters? This paper fears that the answer is “No”.

War has been officially declared against cartel conduct in Australia. However, the weaponry deployed by the Government is of questionable calibre and its strategic thinking leaves the way open for counter-campaigns.⁷⁷ Indeed, from some quarters the cartel legislation is likely to be seen as a Maginot Line prone to being outflanked by elementary manoeuvres. Those manoeuvres include:

- (1) using a facilitating practice that can sidestep the per se prohibitions against cartel conduct (see section 3.2);
- (2) if discussing anything sensitive with a competitor, taking precautions to steer clear of any expression of “commitment” (see section 3.3);
- (3) using a “JV Ultra-Light” to co-ordinate conduct with a competitor (see section 3.4);
- (4) deploying a cartel provision as a condition of the cross-licensing of intellectual property (see section 3.5); and
- (5) as a senior manager, getting lesser employees to do the dirty work without getting close enough oneself to have provable knowledge of personal participation – the “insulated conductor” stratagem (see section 3.6).

⁷⁶ See *ACCC v Leahy Petroleum (No 2)* (2005) 215 ALR 281 at [87]; C Beaton-Wells, ‘Recent corporate penalty assessments under the Trade Practices Act and the rise of general deterrence’ (2006) 14 CCLJ 65 at pp. 79-80.

⁷⁷ For some disturbing lessons from military history see NE Dixon, *On the Psychology of Military Incompetence* (Jonathan Cape, 1976).

The first of these manoeuvres is likely to be particularly attractive mainly because it avoids the need for collusion and, if used adroitly, is relatively low-risk.

Further work is needed to see exactly what might be done sensibly to eliminate any unjustified escape routes. A start has been made by the ACCC proposal for amendments to the TPA in relation to the element of commitment required for an arrangement or understanding.⁷⁸ However, that proposal has been widely criticised.⁷⁹ Dealing effectively with the issue of commitment requires detailed consideration of the wide range of possible facilitating practices and the merit or otherwise of the concept of a concerted practice under EU competition law.⁸⁰

Notwithstanding the social and political importance of the cartel legislation, the difficulty involved in defining sound criminal and civil prohibitions, and 6 years of opportunity, the Australian Treasury has yet to publish a substantial⁸¹ discussion paper on any aspect of the cartel legislation.⁸² The legislation that has emerged under its direction is over-reaching, makeshift and unduly complicated.⁸³ It is also vulnerable to lawful escape routes. The political spin⁸⁴ serves only to confirm that the exercise has been one of trying to “muddle through”⁸⁵ without resolving the toughest issues.

⁷⁸ Australian Competition and Consumer Commission, *Report: Petrol Prices and Australian Consumers: Report of the ACCC into the price of unleaded petrol*, December 2007, pp. 228–9, Appendix R, at <http://www.accc.gov.au/content/item.phtml?itemId=806216&nodeId=d5fc6a56fb589b453abc58f22e0b78bd&fn=Petrol%20prices%20and%20Australian%20consumers%20all%20chapters.pdf>, last viewed 11 March 2009.

⁷⁹ See the submissions made to Treasury, at <http://www.treasury.gov.au/contentitem.asp?ContentID=1511&NavID=037>.

⁸⁰ See C Beaton-Wells and B Fisse, ‘The Cartel Offences: An Elemental Pathology’, paper presented at the Law Council of Australia and Federal Court of Australia joint workshop on cartel criminalisation, Adelaide, 4 April 2009, s 3.

⁸¹ Compare *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 71 per Gummow, Hayne and Heydon JJ.

⁸² The published papers are: Criminal Penalties for Serious Cartel Conduct - Discussion Paper (January 2008) (7 pages); Discussion Paper – Meaning of ‘Understanding’ in the Trade Practices Act 1974 (January 2009) (4 pages). The press release on ‘Criminalisation Proposals’ by the Treasurer on 2 February 2005 was brief (13 pages) and raised more questions than it answered; see B Fisse, ‘The Australian Cartel Criminalisation Proposals: An Overview and Critique’ (2007) 4 Competition LR 51. The Working Party Report on Criminal Penalties for Cartel Conduct (April 2004) was not published and FOI proceedings to obtain access have not been successful, at least not to date.

⁸³ See C Beaton-Wells and B Fisse, ‘The Cartel Offences: An Elemental Pathology’, paper presented at the Law Council of Australia and Federal Court of Australia joint workshop on cartel criminalisation, Adelaide, 4 April 2009, ss 2, 4, 5.4, Attachment 1 and Addendum. On complication, it remains unclear whether or not it will be possible to direct juries on the elements of the cartel offences in a readily comprehensible way. Model jury directions have not been published for consideration. That step should have been taken as part of the process of developing a workable definition of the cartel offences; see Greenwood J, ‘Considerations to be taken into Account in Framing a Cartel Offence’, paper presented at the Competition Law Conference, 24 May 2008, Sydney, at www.fedcourt.gov.au/aboutct/judges_papers/speeches_greenwoodj4.rtf.

⁸⁴ The nadir being the Senate Standing Committee on Economics, *Inquiry into the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, at http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/index.htm

Another reflection on the cartel legislation is that Treasury, the ACCC and the politicians involved may have created a tipping point towards the Rational Self-Interest Model and away from the Compliance Model.⁸⁶ Fervent support has been given to statutory provisions that suffer from obvious defects.⁸⁷ Inducing compliance with law is likely to depend partly on the extent to which legislators and enforcers are respected and trusted by those from whom compliance is sought.⁸⁸ The cartel legislation suffers from over-reach and undue complexity and has been widely criticised on those grounds. Moreover, the Treasury and the ACCC have compromised public respect and trust by resorting to various specious arguments; people respect rigour and toughness, not propaganda or naked attempts to grab more enforcement discretion.⁸⁹ Under these circumstances, no one should be surprised if corporations and their managers react by exploiting whatever lawful escape routes are available wherever to do so is considered to be in their rational self-interest.

⁸⁵ See D Braybrooke & CE Lindblom, *A Strategy of Decision* (Free Press, 1963); as criticised in RE Goodin, *Political Theory & Public Policy* (University of Chicago Press, 1982) ch 2.

⁸⁶ These Models are canvassed in section 2 above. On tipping points see generally: M Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (Little, Brown and Company, 2000).

⁸⁷ See Senate Standing Committee on Economics, *Inquiry into the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, at http://www.apf.gov.au/senate/committee/economics_ctte/tpa_cartels_09/index.htm; S Court, 'Cartels, consumers and the role of the regulator - proposed changes to the Trade Practices Act' (2009), at: <http://www.accc.gov.au/content/index.phtml/itemId/865206/fromItemId/8973>.

⁸⁸ This is a general working hypothesis - the particular attitudes that induce or reduce compliance on the part of particular organisations or particular individuals within organisations vary and are complex: see eg, C Parker & VL Nielsen, 'What Do Australian Businesses Really Think of the ACCC and Does It Really Matter?' (2007) 34 Federal LR 187; C Parker, 'Deterrence, Morality & Business Attitudes Towards the TPA: Empirical Findings from the ACC Enforcement & Compliance Project', paper presented at 6th Annual University of South Australia Trade Practices Workshop, Barossa Valley, 17-18 October 2008. See further V Braithwaite & M Levi (eds), *Trust and Governance* (2003); V Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (Edward Elgar, 2009 (forthcoming)).

⁸⁹ Further relevant factors include the controversy surrounding the prosecution of Richard Pratt, as discussed in L Zwier, 'ACCC's case against Pratt underlines serious failings', AFR 15 May 2009, p. 63; but see C Craigie, 'Pratt case reasonable', AFR 20 May 2009, p. 55.