

DEFINING THE AUSTRALIAN CARTEL OFFENCES:

DISASTER RECOVERY

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1. INTRODUCTION¹

How should the Australian cartel offences be defined? This question has been the subject of discussion and debate for over 6 years but still remains unresolved.

In 2002, the ACCC made detailed submissions to the Dawson Committee² but those submissions were flawed.³ The Dawson Committee did not attempt to discuss the question of criminalisation in the detail expected and referred the most difficult issues back to the Government.⁴ Late in 2003 the Government created a Working Party to consider those issues which included the definition of the cartel offence.⁵ The Working Party reported to the Treasury in April 2004. However, the Working Party Report has never been published and access under the Freedom of Information Act has been refused; the Report may not have been made available to the new Government.⁶ In February 2005 the Treasurer issued a press release outlining the proposals for cartel criminalisation including a brief outline of the cartel offence proposed.⁷ In January 2008 the new Government released an exposure draft Bill (EDB) setting out amendments to the *Trade Practices Act 1974* (Cth) (TPA) and seeking comments from the public.⁸ The EDB was prepared by the previous government and was not endorsed by the new government. The cartel offences in the EDB are complex and raise many questions. The draft provisions have been widely criticised in public submissions.⁹

¹ Thanks are due to Caron Beaton-Wells for detailed comments on an earlier version of this paper, to Ian Leader-Elliott, Warren Pengilley and Stephen Odgers SC for their responses to various queries, and to Susan Cirillo for research assistance. The usual disclaimers apply.

² ACCC, *Submission to the Trade Practices Act Review* (June 2002).

³ See eg Business Council of Australia, *Supplementary Submission to the Review of the Trade Practices Act 1974 and its Administration* (2002); Law Council of Australia, *Submissions to the Trade Practices Act Review Committee* (2002).

⁴ Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) ch 10. See the criticism in Fisse, "The Dawson Review: Enforcement and Penalties" (2003) 26(1) UNSWLJ 315, 317.

⁵ Treasurer, 'Working Party to Examine Criminal Sanctions for Cartel Behaviour', Press Release, 3 October 2003 <http://www.treasurer.gov.au/tsr/content/pressreleases/2003/086.asp>.

⁶ *Fisse v Treasury* [2008] AATA 288 at [124]. An appeal against the decision of the AAT has been lodged in the Federal Court.

⁷ Treasurer, 'Criminal Penalties for Serious Cartel Behaviour' (Press Release 2 February 2005, No. 4 of 2005) www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp.

⁸ The EDB was accompanied by a Discussion Paper of 7 pages. See the Exposure Draft Materials at <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1330>, last viewed 7 May 2008.

⁹ The submissions are available at: <http://www.treasury.gov.au/contentitem.asp?NavId=066&ContentID=1350>, last viewed 7 May 2008.

Critical and constructive assessment of the EDB cartel offences should proceed by considering the standard desiderata that have governed the definition of serious offences.¹⁰ These desiderata are well-known:

- coverage of the most serious forms of conduct without over-reach;
- certainty of definition of the physical and fault elements of the offence and ease of application by corporations and their advisers, investigators, prosecutors, judges and jurors;
- fault-based rather than strict or vicarious individual and corporate criminal responsibility;
- avoidance of loopholes and avenues for unmeritorious defences; and
- accurate labelling and clear deterrent signalling.

The purpose of this paper is:

- (1) to examine the design assumptions implicit in the EDB cartel offences and explain why they are flawed (Part 2);
- (2) to suggest offences of collusive market subversion as alternatives to the EDB cartel offences (Part 3);
- (3) to explain why the definition of the EDB cartel offences is unsatisfactory and to advance possible solutions based on the desiderata indicated above (Parts 4-8); and
- (4) to propose a reconstruction plan (Part 9).

The paper builds on the discussion of the EDB cartel offences by Caron Beaton-Wells and me as part of an issues paper on the exposure draft materials released by the Government in

¹⁰ See further A Ashworth, *Principles of Criminal Law* (5th ed 2006) chs 2-3; A Halpin, *Definition in the Criminal Law* (2004); G Williams, *Criminal Law: The General Part* (2nd ed, 1961); RA Duff and SP Green, *Defining Crimes* (OUP, 2005).

January 2008 (**Issues Paper**).¹¹ The focus is on definition of the cartel offences. The following topics are beyond its scope:

- the policy question of whether or not serious cartel conduct should be criminalised – politically, that question has been decided in Australia;¹²
- the nature and limits of per se prohibition as a method of prohibiting anti-competitive conduct;¹³
- the definition of the per se civil penalty prohibitions (existing or proposed) except where directly relevant to the definition of the cartel offences;¹⁴
- the definition and scope of the defences and exemptions that apply to the existing civil penalty prohibitions;
- the meaning of the requirement of a “contract, arrangement or understanding” as those words are carried over to the EDB cartel offences – it is unlikely that these provisions will be amended in the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill (Cth) to be introduced this year;¹⁵
- the question of gaps in the draft memorandum of understanding between the Australian Competition and Consumer Commission (**ACCC**) and the

¹¹ Caron Beaton-Wells and Brent Fisse, “Submission: The Exposure Draft Bill, Draft ACCC-CDPP MOU and Discussion Paper introducing criminal penalties for serious cartel conduct in Australia, Attachment 1”, 7 March 2008, available at:

http://www.treasury.gov.au/documents/1350/pdf/dr_caron_beaton-wells_and_mr_brent_fisse.pdf, last viewed 25 April 2008. See also B Fisse, “The Cartel Offence: Dishonesty?” (2007) 35 ABLR 235, an earlier statement of some of the points made in the present paper.

¹² See Minister for Competition Policy and Consumer Affairs, “Reviewing the Federal Government's Amendments to the *Trade Practices Act 1974*”, 4th Annual Trade Practices and Corporate Compliance Summit, Sydney, 28 April 2008, at:

<http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2008/003.htm&pageID=005&min=ce b&Year=&DocType=>, last viewed 7 May 2008.

¹³ See F Easterbrook, “The Limits of Antitrust” (1984) 63 Texas LR 1; O Black, *Conceptual Foundations of Antitrust* (CUP, 2005) ch 3.

¹⁴ See Issues Paper, especially Part 5. See further GJ Werden, “Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory” (2004) 71 Antitrust LJ 719.

¹⁵ For a discussion of the ACCC’s proposal to make the element easier to establish, see Issues Paper, Part 5.2; I Wylie, “Understanding ‘Understandings’ under the Trade Practices Act - An Enforcement Abyss?” (2008) 16 TPLJ 20; I Tonking, “Belling the CAU: Finding a Substitute for ‘Understandings’ about Price” (2008) (forthcoming). More fundamentally, see RA Posner, *Antitrust Law* (Univ of Chicago Press, 2nd ed, 2001) ch 3.

Commonwealth Director of Public Prosecutions (CDPP) (ACCC-CDPP Draft MOU);¹⁶

- the implications of cartel offences for the operation of money-laundering offences under the *Criminal Code* (Cth).¹⁷

¹⁶ See Issues Paper, Part 11.

¹⁷ See B Fisse, “The Australian Cartel Criminalisation Proposals: An Overview and Critique” (2007) 4 *Competition Law Review* 51 at 68.

2. THE DEFINITION OF CARTEL OFFENCES UNDER THE EDB

This Part discusses: the main features of the EDB cartel offences (Part 2.1); the questionable design assumptions implicit in the EDB cartel offences (Part 2.2); the limited guidance available from statutory models in other jurisdictions (Part 2.3); and the dream of simple definition after the EDB nightmare (Part 2.4).

2.1 The cartel offences under the EDB

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

- (1) A corporation commits an offence if:
 - (a) the corporation makes a contract or arrangement, or arrives at an understanding, with the intention of dishonestly obtaining a benefit; and
 - (b) the contract, arrangement or understanding contains a cartel provision.

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

- (1) A corporation commits an offence if:
 - (a) a contract, arrangement or understanding contains a cartel provision; and
 - (b) the corporation gives effect to the cartel provision with the intention of dishonestly obtaining a benefit.

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

“Cartel provision” is defined in s 44ZZRD. A provision is a cartel provision if two conditions are satisfied in relation to the provision:

- (a) the purpose / effect condition set out in subs (2);
- (b) the competition condition set out in subs (3).

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

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

- (a) price-fixing;
- (b) restricting outputs in the production and supply chain;
- (c) allocating customers, suppliers or territories; or
- (d) bid-rigging.

Each of these effects is defined under s 44ZZRD(2).

“Party” has an extended meaning: if a body corporate is a party to a contract, arrangement or understanding, each related body corporate is taken also to be a party (s 44ZZRC).

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

The cartel offences are subject to a jail term of up to 5 years and a fine of \$220,000 for individuals.¹⁸ Corporations are punishable on conviction by a fine not exceeding the greater of the following:

- (a) \$10,000,000;
- (b) if the court can determine the total value of the benefits that:
 - (i) have been obtained by one or more persons; and

¹⁸ For a critique, see Issues Paper, Parts 17.3-17.4.

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

3 times that total value;

(c) if the court cannot determine the total value of those benefits—10% of the corporation’s annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence.¹⁹

2.2 Questionable design assumptions implicit in the EDB cartel offences

Four questionable design assumptions are implicit in the EDB cartel offences. They are:

- (1) cartel offences can be differentiated sufficiently from per se civil penalty prohibitions by adding a requirement of criminal intent (an intention dishonestly to obtain a benefit) and requiring that the elements of the offences be proven beyond reasonable doubt rather than on the civil standard of proof under *Briginshaw v Briginshaw*;²⁰
- (2) it is convenient and appropriate to define the cartel offences and per se civil penalty prohibitions in terms of the same physical elements;
- (3) the existing per se civil penalty prohibitions do not provide suitable building blocks for defining the cartel offences; and
- (4) the concept of serious cartel conduct is difficult or impossible to define and is best reflected largely at the levels of prosecutorial discretion and sentencing.

The flaws in each of these assumptions are considered below.

¹⁹ For a critique, see Issues Paper, Parts 17.2, 17.5.

²⁰ (1938) 60 CLR 336. See generally CR Williams, “Burdens and Standards in Civil Litigation” (2003) 25 Sydney LR 165.

2.2.1 How should the EDB cartel offences be differentiated from the per se civil penalty prohibitions?

Definition of a cartel offence necessarily depends on the framework for construction that is adopted. As discussed in the Issues Paper,²¹ the cartel offences in the EDB do not appear to be based on an articulate and systematic approach to the differentiation of the offences from per se civil penalty prohibitions.

An articulate and systematic approach to the differentiation of a cartel offence from per se civil penalty prohibitions would specify and take account of standard desiderata for the definition of offences.²² The main desiderata are as set out in the introduction (Part 1).

As discussed in Parts 4-8 below, these desiderata are not satisfied by the EDB cartel offences. Instead, the approach taken in the EDB and the accompanying Discussion Paper is pre-occupied with making the element of dishonesty (or, in the case of the Discussion Paper, fraud or some other proxy for dishonesty) the prime distinguishing feature of criminal liability for cartel conduct.²³ This pre-occupation is misguided. The concept of dishonesty is incapable of distinguishing serious from less serious forms of prohibited cartel conduct. Even very minor instances of deception or fraud are “dishonest”,²⁴ the concept of “trivial dishonesty” is commonplace. It is nonsense to suggest (as the EDB and the Discussion Paper seem to imply) that dishonesty necessarily requires serious wrongdoing. The concept of dishonesty serves no useful purpose when defining a cartel offence, is uncertain in meaning, creates avenues for unmeritorious denials of liability and imprints a false and misleading label. Accordingly, dishonesty should not be an element of the Australian cartel offences; see the critique in Parts 4.2, 5.2, 7.2, 7.3, and 8.2.

²¹ Issues Paper, Part 3.

²² See further A Ashworth, *Principles of Criminal Law* (5th ed 2006) chs 2-3; A Halpin, *Definition in the Criminal Law* (2004).

²³ See Treasury, Discussion Paper, 3-5; Issues Paper Part 3.2.

²⁴ To borrow Ambrose Bierce’s definition of deception, dishonesty is the soul of religion, the essence of commerce, and the bait of courtship: *The Devil’s Dictionary* (Dover Publications, 1958). See further S Bok, *Lying: Moral Choices in Public and Private Life* (1979); HG Wells, *Research Magnificent* (Kessinger Publishing, 2003) 241 (“trivial dishonesty”). Examples of trivial or minor dishonesty proliferate. People frequently cheat at cards or sport, which forms of dishonesty are always disappointing but rarely sufficient to justify criminal liability. See further D Callahan, *The Cheating Culture: Why More Americans are Doing Wrong to Get Ahead* (Harcourt, 2004). Accordingly, it has been suggested by Ian Leader-Elliott that criminal liability for theft should require a gross degree of dishonesty, just as manslaughter by criminal negligence requires a gross degree of negligence: C Howard, *Criminal Law* (Law Book Co, 3rd ed 1977, 261).

2.2.3 Should cartel offences and per se civil penalty prohibitions be defined in terms of the same physical elements?

The EDB defines major elements of the cartel offences in the same way as for the new per se civil penalty prohibitions. The purpose/effect condition and the competition condition defined in s 44ZZRD(2) apply to the new cartel offences as well as the new per se civil penalty prohibitions. This approach to the design of cartel offences is likely to generate offences that are wider in scope than offences defined independently of civil penalty and civil remedy provisions.

It is axiomatic that offences should be defined no more broadly than is necessary to cover the conduct that warrants criminal prohibition.²⁵ Yet over-reach is inevitable where the same wording is used to define both an offence and a civil penalty or civil remedy. According to the High Court in *Waugh v Kippen*,²⁶ wording used to define criminal and civil proscriptions relating to the same subject matter is to be given the same interpretation in both contexts (the legislature cannot be taken to have spoken “with a forked tongue”). This one-dimensional doctrine of interpretation is difficult or impossible to reconcile with achieving the different statutory purposes of criminal liability, civil penalty liability and civil liability for damages or injunctive relief.²⁷ A narrow interpretation may be justified for criminal liability, but too restrictive in context of civil penalties or for the purpose of civil remedies. Conversely, a broad interpretation adopted to suit the context of civil remedies may be too broad for the purpose of a civil penalty and unjustified for the purpose of criminal liability. Obvious as this legislative drafting trap is, the EDB has fallen into it. For example, a narrow interpretation of the words “controlling a price” may be appropriate in the context of a cartel offence but would be precluded by the *Waugh v Kippen* doctrine where the same wording has received a broader interpretation in the context of the civil penalty prohibition against price fixing.

More generally, it is misleading to assume that cartel offences and civil liability provisions are best defined in common or parallel terms. The effect of such tunnel vision is to block out consideration of the various possible ways in which the elements of the cartel offences could and should be defined more narrowly than for the per se civil liability prohibitions.

²⁵ A Ashworth, *Principles of Criminal Law* (5th ed 2006) 30-35.

²⁶ (1986) 160 CLR 156 at 165.

²⁷ Contrast the interpretation of the fault element under s 1 of the *Sherman Act* by the US Supreme Court in *US v United States Gypsum Co*, 438 US 422 (1978) where it was held that the fault element required for criminal liability was more exacting than the fault element required for civil liability notwithstanding that s 1 defined criminal and civil liability in the same terms (ie a conspiracy to restrain trade).

2.2.4 Are the existing per se civil penalty prohibitions unsuitable building blocks for defining the cartel offences?

The EDB introduces a new regime of per se civil penalty prohibitions which are taken as a foundation for defining the cartel offences under ss 44ZZRF and 44ZZRG. The cartel offences differ only in three major respects:

- (a) liability for a cartel offence requires an “intention dishonestly to obtain a benefit”;
- (b) the cartel offences have additional implied fault elements that are required under the application of the general fault principles under the *Criminal Code* (Cth); and
- (c) the cartel offences are not subject to a joint venture defence.

The EDB dispenses with the existing prohibition against price fixing as defined in s 45A(1) but preserves the prohibition against an exclusionary provision as defined in s 4D.

A more obvious approach is to take the existing per se civil penalty prohibitions against price fixing and exclusionary provisions as the starting point for constructing new cartel offences. The existing per se civil penalty provisions:

- are familiar;
- cover much the same ground as the concepts of price fixing, restriction of output, allocation of customers and bid-rigging employed in the new EDB per se civil penalty prohibitions;²⁸ and
- have limitations that are both known and addressable without radical surgery or major implants.

It is difficult to understand why the EDB adopts a different approach by prescribing four categories of cartel conduct, namely price fixing, restriction of output, allocation of customers and bid-rigging.²⁹

²⁸ The new concepts are wider in minor but controversial respects; see Issues Paper, Part 5.3.

- defining civil penalty prohibitions and cartel offences in terms of these categories of cartel conduct offers no apparent advantage, whether in terms of scope, certainty and ease of application or avoidance of loopholes; and
- the concepts of restriction of output, allocation of customers and bid-rigging are new and untested and impose additional compliance costs.

The approach taken is all the more difficult to understand given that the EDB retains the existing per se civil penalty prohibition against an exclusionary provision.

2.2.5 Is the concept of serious cartel conduct best reflected largely at the levels of prosecutorial discretion and sentencing?

The definition of the EDB cartel offences does not adequately reflect the concept of serious cartel conduct.

Instead, the EDB misguidedly relies on dishonesty (see Part 2.2 above) and otherwise places considerable reliance on prosecutorial discretion as the means of limiting the application of the cartel offences to serious cartel conduct. This is apparent from the ACCC-CDPP Draft MOU.³⁰ The Draft MOU states that “criminal investigations and prosecutions will be targeted at serious cartel conduct and relatively minor conduct will ordinarily be pursued civilly.”³¹ The criteria to be applied in relation to the decisions to investigate and prosecute amplify to some extent what is meant by “serious” as opposed to “relatively minor.” These criteria relate primarily to the economic harmfulness or potential harmfulness of the conduct, including whether the value of the affected commerce would exceed \$1 million within a 12 month period (that is, where the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed \$1 million within a 12 month period). They do not refer to the degree of “dishonesty”.

The heavy reliance placed by the EDB on prosecutorial discretion to limit prosecutions for the cartel offences to serious cartel conduct leaves much to be desired:

²⁹ Compare the further category of rule fixing: RH Lande & HP Marvel, "Rule Fixing: An Overlooked but General Category of Collusion" in A Cucinotta, R Pardolesi & R Van den Burgh (eds), *Post-Chicago Developments in Antitrust Law* (Edward Elgar, 2002) ch 9.

³⁰ See further the critique in Issues Paper, Part 11.

³¹ At [1.2].

- the ACCC-CDPP Draft MOU does not deal adequately with all the factors that are relevant to offence-seriousness,³² and
- the exercise of prosecutorial discretion is an administrative process that is secret and highly discretionary, not a public determination of liability by a jury in accordance with known legislative requirements.³³

The seriousness of an offence needs to be reflected in the sentence imposed on an offender. However, the seriousness of an offence is not entirely a sentencing issue: seriousness is a threshold issue of liability, which explains why many offences are structured in terms of aggravated forms of liability.³⁴ Consider offences of assault. Typically these include assault and the aggravated assaults of assault occasioning bodily harm and assault with intent to cause serious bodily harm.

2.3 Limited guidance available from statutory models in other jurisdictions

Statutory models in other jurisdictions provide limited guidance. There are no embryos worth cloning for Australia:

- The offence under s 1 of the *Sherman Act* 1890 (US) is defined in terms of a contract, combination or conspiracy in “restraint of trade”. This broad concept has been surveyed in an extensive body of case law, Department of Justice guidelines and numerous commentaries.³⁵ The results are highly instructive³⁶ but s 1 itself is not commendable as a statutory model; the

³² See Issues Paper, Parts 11.1, 11.4. Compare, in relation to corporate offenders, United States, Department Of Justice, *Justice Department Guidelines on Prosecution of Corporations* (2007) (copy unavailable on DOJ website; copy available on request from Brent Fisse).

³³ This is not necessarily to say that the volume of commerce affected should be a jurisdictional element of the cartel offences. See Issues Paper, Part 11.4.

³⁴ See further A Ashworth, *Principles of Criminal Law* (5th ed 2006) 88-90.

³⁵ The prize exhibit being in 20 volumes: P Areeda and H Hovenkamp, *Antitrust Law*. The history of the first half-century of criminal liability under the *Sherman Act* is traced in PE Hadlick, *Criminal Prosecutions under the Sherman Antitrust Act* (Ransdell Incorporated, 1939). See also WH Taft, *The Anti-trust Act and the Supreme Court* (Harper & Brothers, 1914). On the role of prosecutorial discretion in deciding which cases are subject to criminal prosecution under s 1 of the *Sherman Act* see D Baker, "To Indict or Not to Indict - Prosecutorial Discretion in Sherman Act Enforcement" (1978) 63 Cornell LR 405. For a more recent review of US criminal antitrust enforcement action against cartel conduct, see D Baker, "The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging" ((2001) 69 George Washington LR 693.

³⁶ See eg the critiques in: M Lemley & C Leslie, “Categorical Analysis in Antitrust Jurisprudence” (2007) available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026967; LW Jacobs, "Criminal Enforcement of Antitrust Laws - Problems with the US Model" in 2006 Fordham Comp L Inst 25 (B Hawk ed 2007).

section is comparable to an attempt to define theft by issuing the edict: “Thou shall not steal”.³⁷

- The general conspiracy offence under s 45 of the *Competition Act* 1985 (Can) is defined in terms of price fixing and other conduct that “unduly” restricts competition.³⁸ The vagueness of the statutory language has been much debated, without producing any convincing alternative.³⁹
- The cartel offence under s 188 of the *Enterprise Act* 2002 (UK) is defined in complex terms and relies on dishonesty as a prime element.⁴⁰ The provisions of the *Enterprise Act* offer a useful basis for comparison in some respects but are otherwise deeply flawed, partly because the two main discussion papers on which they are based are of not of high calibre.⁴¹
- The physical elements of the cartel offence under s 6 of the Irish *Competition Act* 2002⁴² are defined in very broad terms (s 6(1)(2)) and the fault element is relegated to affirmative defences. For example, under s 6(2), fault is presumed unless the defendant proves that the agreement alleged did not have “as its object the prevention, restriction or distortion of competition in trade in

³⁷ Criticised on this ground in H Mannheim, “Freedom of Competition and Criminal Law” (1944) 7 Modern LR 1 at 4. For a rare attempt to redraft s 1 in more specific terms see RH Heidt, “A Redrafted Section 1 of the Sherman Act” (1991) 66 Notre Dame LR 603. See also the reconstruction of s 1 analysis in TC Arthur, “Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act” (1986) 74 Calif LR 263. The US Antitrust Modernization Commission (2006) saw no need to amend s 1.

³⁸ There is a specific offence of bid-rigging under s 47.

³⁹ See Canada, Discussion Paper, “Options for Amending the *Competition Act*: Fostering a Competitive Marketplace” (June 2003); Canadian Bar Association, National Competition Law Section, Submission on Reform of Section 45 of the *Competition Act* (Conspiracy) (February 2003); MJ Trebilcock, RA Winter, P Collins and EM Iacobucci, *The Law and Economics of Canadian Competition Policy* (2003) 111-130; PL Warner & MJ Trebilcock, “Rethinking Price-Fixing Law” (1993) 38 McGill LJ 679; JT Kennish and TW Ross, “Toward a New Canadian Approach to Agreements between Competitors” (1997) 28 Canadian Business LJ 22; P Hughes P and M Sanderson, “Conspiracy Law and Jurisprudence in Canada: Towards an Economic Approach” (1998) 13 Review of Industrial Economics 153; R Janda & DM Bellemare, “Canada’s Prohibition against Anti-Competitive Collusion: The New Rapprochement with US Law” (1993) 38 McGill LJ 620; PS Crampton & JT Kissack, “Recent Developments in Conspiracy Law and Enforcement: New Risks and Opportunities” (1993) 38 McGill LJ 569.

⁴⁰ See further M Furse and S Nash, *The Cartel Offence* (Hart Publishing, 2004); J Joshua & C Harding, “Breaking up the Hard Core: The Prospects for the Proposed Cartel Offence” [2002] Criminal LR 933.

⁴¹ See: UK, Office of Fair Trading Report, *Proposed Criminalisation of Cartels in the UK*, (OFT 365, November 2001); UK, Department of Trade and Industry, White Paper, *A World Class Competition Regime* (Cm 5233, July 2001); as criticised in B Fisse “The Cartel Offence: Dishonesty?” (2007) 35 ABLR 235 at 252-253.

⁴² See generally P Massey, “Criminal Sanctions for Competition Law: A Review of Irish Experience” (2004) 1 Competition LR 23.

any goods or services in the State or in any part of the State or within the common market, as the case may be.”

- The Israel *Restrictive Trade Practices Law* 1988 provides for a cartel offence subject to a maximum jail term of 5 years where there are aggravating circumstances (s 47A(1)). The aggravating circumstances are vaguely described. This vagueness is mitigated to some extent by a defence of good faith: it is a defence for an employee or agent to show that “he acted on behalf of his employer or his client and in accordance with their instructions, and that he believed, in good faith, that his actions were not tantamount to an offense as provided by this Law.”
- Many jurisdictions, most notably the EU and New Zealand, do not have a cartel offence and have yet to announce any plans to introduce such an offence.⁴³
- The OECD and ICN “definitions” of serious cartel conduct are nostrums, not blueprints.⁴⁴
- There is no model code comparable to, for example, the *ALI Model Penal Code*; Gower’s *Companies Code* 1963 (Ghana); the *ALI Uniform Commercial Code*; or the *UNCITRAL Model Law on Electronic Commerce*.⁴⁵

⁴³ For the EU see: C Harding & J Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (2003); WPJ Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics* (2002); WPJ Wils, "Is Criminalisation of EU Competition Law the Answer?" (2005) 28 *World Competition* 117; KJ Cseres KJ, MD Schinkel & FOW Vogelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (2006). In NZ, a recent freedom of information application has indicated that the Ministry of Commerce has no plans afoot to criminalise cartel conduct (communication to author by Grant David).

⁴⁴ OECD, Report, *Fighting Hard-Core Cartels* (2002); ICN, Working Group on Cartels, Report, *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties* (2005).

⁴⁵ Compare the draft GATT-MTO International Antitrust Code, as discussed in DJ Gifford, "The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry" (1997) 6 *Minnesota J of Global Trade* 1.

2.4 The dream of simple definition after the EDB nightmare

The nightmare of the EDB cartel offences impels dreams of simple definitions. Three such dreams are:

- the definitional morass can be avoided by defining the cartel offences simply in terms of individual criminal liability;
- the offence of conspiracy to defraud is an attractive alternative given that it is well-known, relatively straightforward, and extendable to cover private sector victims of serious cartel conduct;⁴⁶ and
- the offence of conspiracy under s 11.5 of the *Criminal Code* (Cth) can be deployed by making the existing per se civil penalty prohibitions an unlawful object of that offence.

Unfortunately, each of these dreams is a fantasy.

Limiting a cartel offence to individual criminal liability is not a tenable solution. First, this approach hardly avoids the need to define the cartel conduct that is the subject of prohibition. Secondly, there is no cogent policy justification for excluding corporate criminal liability:

- corporate criminal liability recognises that difficulties of investigation and enforcement resources stand in the way of prosecuting all the individuals implicated in the commission of a cartel offence;⁴⁷
- price fixing and other forms of serious cartel conduct are rarely the product of insular individual choice but typically are related to organisational pressures and failures of organisational control;⁴⁸ and

⁴⁶ Conspiracy to defraud under s 135.4 of the *Criminal Code* (Cth) is limited to situations where the intended victim is a Commonwealth entity.

⁴⁷ See B Fisse & J Braithwaite, *Corporations, Crime and Accountability* (1993) 36-41. See also C Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (2007) 149-150. The explanation given in UK, Office of Fair Trading, *Proposed Criminalisation of Cartels in the UK* (OFT 365, 2001) at 1.19, 2.11 is very brief and does not discuss eg the extensive reliance on corporate criminal liability under US antitrust laws.

⁴⁸ See B Fisse & J Braithwaite, *Corporations, Crime & Accountability* (1993) 24-31.

- the argument that corporate criminal liability is unnecessary because the only penalty that can be imposed on a corporation is a monetary penalty of the kind already imposed in civil or administrative proceedings takes insufficient account of the importance of the stigma flowing from the conviction of a corporation for an offence.⁴⁹

The prospect of relying on conspiracy to defraud instead of a cartel offence has been mooted in the UK.⁵⁰ However, the recent decision of the House of Lords in *Norris v The Government of the United States*⁵¹ has dashed any such prospect. The House of Lords squarely rejected the proposition that simple price fixing is a conspiracy to defraud. In this case, the extradition request by the US Department of Justice had to show that the price fixing conduct alleged against Mr Norris in the US would be an extraditable offence under UK law if the conduct had occurred in the UK. The requirement of dual criminality could not be met on the basis of the cartel offence under s 188(1) of the *Enterprise Act* because that offence was introduced in 2002 and did not exist at the time of the alleged price fixing. The extradition request was framed on the basis that the alleged price fixing would amount to a conspiracy to defraud if the conduct had occurred in the UK. The Divisional Court upheld the request for extradition on the basis that a secret price fixing agreement inherently involved dishonesty and amounted to a conspiracy to defraud at common law. The House of Lords overturned that decision on the ground that the conduct alleged in the indictment would not amount to a conspiracy to defraud at common law.⁵² It was held that conspiracy to defraud requires more than simply an agreement in secret to fix prices – there must be deception or misrepresentation in addition to any false impression created by a simple price fixing agreement. Accordingly, cases of simple yet serious price fixing do not amount to a conspiracy to defraud under UK common law. If serious cartel conduct is to be criminalised, plainly there is no justification for excluding simple yet serious cases of price fixing.

Nor would reliance on the offence of conspiracy under s 11.5 of the *Criminal Code* (Cth) be a satisfactory approach:⁵³

⁴⁹ See B Fisse & J Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983).

⁵⁰ J Joshua, “Norris v United States: A Stalking Horse for the Cartel Offence”, *Competition Law Insight* 12 February 2008 11.

⁵¹ [2008] UKHL 16. See also *R v GG plc* [2008] UKHL 17. See further J Joshua, “Dishonesty after *Norris*: Is the cartel offence the phantom ship of antitrust?” *Competition Law Insight* 8 April 2008 13.

⁵² The House of Lords disagreed with the view of conspiracy to defraud taken in *J Lever and J Pike*, “Cartel Agreements, Criminal Conspiracy and the Statutory ‘Cartel Offence’” (2005) 26 *ECLR* 90, 164.

⁵³ Compare J Joshua & S Jordan, “Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law” (2004) 24 *Northwestern J of Int’l Law & Bus* 647; J Rahl, “Conspiracy and the Antitrust Laws (1950) 44 *Illinois LR* 743.

- the physical elements of the existing per se civil penalty prohibitions against price fixing and exclusionary provisions are defined too broadly for the purpose of criminal liability;⁵⁴ and
- a conspiracy to make a contract or arrangement, or to arrive at an understanding, to engage in cartel conduct is a form of double inchoate liability, namely an agreement to agree to commit an offence.⁵⁵

It may also be noted that, in the context of the TPA, an offence of conspiracy is not a highly distinctive signifier of criminal conduct: conspiracy is also a civil penalty prohibition.⁵⁶

⁵⁴ See the criticisms of the existing per se civil penalty prohibitions in W Pengilley, *Price Fixing and Exclusionary Provisions* (Prospect, 2001).

⁵⁵ On double inchoate liability, see generally I Robbins, "Double Inchoate Crimes" (1989) 26 Harv Jnl on Legislation 1; P Glazebrook, "Should We Have a Law of Attempted Crime?" (1969) 85 LQR 28.

⁵⁶ TPA s 76(1)(f).

3. ALTERNATIVE SUGGESTED OFFENCES OF COLLUSIVE MARKET SUBVERSION

This Part outlines alternative possible offences of collusive market subversion.⁵⁷ The aim is to facilitate constructive comparisons in the critique of the EDB cartel offences in Parts 4-8 and to lay a foundation for the reconstruction plan outlined in Part 9.

3.1 Collusive market subversion and giving effect to collusive market subversion

As an alternative to the EDB cartel offences, offences of collusive market subversion and giving effect to collusive market subversion might be defined along these lines:⁵⁸

- (1) A corporation shall not:
 - (a) intentionally make a contract or arrangement or arrive at a understanding with a competitor in the knowledge or belief that the contract, arrangement or understanding contains a cartel provision; or
 - (b) intentionally give effect to a cartel provision in the knowledge or belief that the provision is a cartel provision contained in a contract or arrangement made, or an understanding arrived at, by the corporation and a competitor.
- (2) A cartel provision is a provision that is contained in a contract, arrangement or understanding between a corporation and a competitor, and:
 - (a) is intended by the corporation and the competitor to fix, control or maintain the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the corporation or the competitor, or by any body corporate that is related to either of them, in competition with each other; or

⁵⁷ There are many other possibilities that capture the gravamen of serious cartel conduct; they include "collusive suppression of competition," as suggested by the discussion of *US v Trans-Missouri Freight Association*, 166 US 290 (1897) in RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1993) 23.

⁵⁸ Perhaps as s 45AA under the Eveready-Duracell numbering scheme that has been adopted for the TPA.

- (b) is intended by the corporation and the competitor to lessen competition between the corporation and the competitor, or between the corporation or the competitor and a third party competitor, by restricting or preventing the supply or acquisition of goods or services by the corporation or the competitor, either generally or in particular circumstances or on particular conditions, in competition with each other.
- (3) Intention is defined as under s 5.2 of the *Criminal Code* (Cth):
- (a) A person has intention with respect to conduct if he or she means to engage in that conduct.
 - (b) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
 - (c) 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.
- (4) In proceedings against a person in relation to a contravention of (1)(a) or (b) it is a defence (the defence of legitimate primary intention) if the person establishes that the cartel provision is intended primarily:
- (a) to increase the output of goods or services, to reduce their cost, to improve their quality or to achieve the use of environmentally sustainable resources;
 - (b) to prevent a serious risk to a person's life or the health or safety of the public or a section of the public or to remedy serious physical harm occasioned to a person or serious damage to property;⁵⁹ or
 - (c) to prevent a serious risk to the environment or to remedy serious harm occasioned to the environment.⁶⁰

⁵⁹ Compare *Criminal Code* (Cth) s 100.1.

⁶⁰ Compare *Criminal Code* (Cth) s 100.1.

- (5) Existing defences and exemptions applicable to the per se civil penalty prohibitions against price fixing and exclusionary provisions apply, in suitably revised form, to the offences under (1)(a) and (1)(b).

The prime features of the approach indicated above are as follows:

- the existing per se civil penalty prohibitions against price fixing and exclusionary provisions are taken as the starting point, for the reasons indicated in Part 2.2.4 above;
- the offence of collusive market subversion reflects the concept of serious cartel conduct in these main ways:
 - (a) an intention to fix prices or restrict competitive conduct is required – recklessness is insufficient (contrast the position under ss 44ZZRF and 44ZZRG);
 - (b) an intention to fix prices or to lessen competition with a competitor is required on the part of all the parties alleged to be principal offenders – it is insufficient that only two alleged principal offenders acted with that intention (contrast the position under ss 44ZZRF and 44ZZRG);
 - (c) the intention must be that of the parties, as distinct from the “purpose of the provision” (contrast the position under the existing and proposed per se civil penalty prohibitions);
 - (d) the concept of an exclusionary provision is re-defined in terms based directly on the underlying economic rationale (contrast s 4D),⁶¹
 - (e) all the alleged principal offenders must be competitors, not merely two of them (contrast the position under ss 44ZZRF and 44ZZRG);
 - (f) the defence of legitimate primary intention under (4)(a) enables liability be avoided where the cartel provision is ancillary to

⁶¹ See P Areeda & H Hovenkamp, *Antitrust Law*, chs 19B, 20D, 22A. On the underlying rationale for s 4D see W Pengilley, *Price Fixing and Exclusionary Provisions* (Prospect, 2001) Parts 8, 10; W Reid, “Exclusionary Provisions – Dead, Alive or Living in Mexico?” (2003) Law Council of Australia, Trade Practices Committee Workshop.

cooperative productive activity and hence a socially desired rather than unwanted type of conduct;

- (g) the defence of legitimate primary intention under provisions (4)(b) and (c) enable liability to be avoided where the cartel provision is ancillary to certain forms of cooperative activity that are plainly in the public interest; and
- (h) the defences and exemptions that apply to existing per se civil prohibitions (eg a defence for genuine joint ventures; an exemption for related corporations) are available (in adapted form).⁶²

3.2 Explanatory notes

The nature and scope of the provisions outlined above warrants further explanation:

- Provision needs to be made for the liability of individual employees or agents of a corporation⁶³ if the view is taken that it is insufficient to rely on the *Criminal Code* (Cth) provisions on liability as an accomplice or the TPA provisions on ancillary liability, including liability for being knowingly concerned in an offence.
- The alleged principal offenders must be competitors at all levels of the supply, production or distribution chain to which the contract, arrangement or understanding and the cartel provision relate (contrast s 45A(1) which requires two parties to a contract, arrangement or understanding to be

⁶² This is hardly to suggest that there is no need for reform of the defences and exemptions now available under the TPA to negate or exclude liability for price fixing or exclusionary provisions. See eg the criticism of the intellectual property exemption under s 51(3) and proposals of the Ergas Committee and the government for reforming s 51(3) in I Eagles & L Longdin, "Competition in Information and Computer Technology Markets: Intellectual Property Licensing and Section 51(3) of the Trade Practices Act" (2003) 3 QUTLJ 31. The joint venture defence under s 76C and s 76D is criticised in B Fisse, "The Joint Venture Defences under Sections 76C and 76D of the Trade Practices Act" (15 May 2008), at www.brentfisse.com/publications.html. The collective bargaining notification procedure is criticised in S McCrystal, "Collective Bargaining and the Trade Practices Act" (2007) 20 Australian Journal of Labour Law 207.

⁶³ See EDB, s 6(2C)(n) (extended application of cartel offences – reference to a "corporation" in Part IV Division 1 (other than s 44ZZRD) includes a reference to "a person not being a corporation").

competitors only at the level of the goods and service to which the price fixing provision relates).⁶⁴

- “Competitor” includes a corporation that would be likely to be a competitor but for the cartel provision.⁶⁵ “Third party competitor” means a competitor of the parties who make a contract or arrangement or arrive at an understanding or give effect to a cartel provision contained in a contract, arrangement or understanding and who is not a party to that contract, arrangement or understanding.
- The concept of an intention to lessen competition between competitors in (2)(b) above is based partly on a redefinition of s 4D proposed by Pengilley.⁶⁶ This concept does not require an evaluation of competition in a market as a whole, nor of whether the restriction of supply or acquisition had the purpose, effect or likely effect of substantially lessening competition in a market.
- It is irrelevant under (2)(b) whether or not the restriction of output or the allocation of customers is targeted at competitors.⁶⁷
- The definition of price fixing in (2)(a) above does not follow the notorious dictum of Lockhart J in *Re: Radio 2UE Sydney and Stereo FM Pty Limited and 2 Day-FM Limited* (1982) 62 FLR 437 at 448 that there is no fixing, controlling or maintaining of a price under s 45A(1) where the conduct affects the price "by improving competition".⁶⁸ A test of improvement of

⁶⁴ Consider the problem under 45A(1) discussed in A Nicotra & J O’Regan, “Dare To Deem - Does Section 45A Trade Practices Act Prohibit ‘Pro-Competitive’ Price Fixing?” (2001); AI Tonking, “Competition at Risk? New Forms of Business Cooperation” (2002) 10 *Competition & Consumer Law Journal* 169, Pts 10, 11. For further background, see Issues Paper, Part 5.3.1 B2.

⁶⁵ See TPA s 4D(2), 45A(8).

⁶⁶ W Pengilley, *Price Fixing and Exclusionary Provisions* (Prospect, 2001) Attachments 1-2.

⁶⁷ The Dawson Committee recommended that s 4D be amended by including such a restriction (following s 29 of the *Commerce Act* 1986 (NZ)): Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) 128. However, that recommendation is unpersuasive because it lacks a clear economic foundation and is inconsistent with US antitrust law: see W Reid, “Exclusionary Provisions – Dead, Alive or Living in Mexico?” (2003) Law Council of Australia, Trade Practices Committee Workshop.

⁶⁸ The dictum was not endorsed by the Full Federal Court on appeal and has no clear support in later Australian case-law. The influence of the dictum has been exaggerated in some quarters. See eg P Scott, “Unresolved Issues in Price Fixing: Market Division, The Meaning of Control and Characterisation” (2006) 12 *Canterbury LR* 197 at 230, where it is contended that: “a number of Federal Court decisions have favourably cited Lockhart J’s comments on characterisation”, with reference (fn 208) to: *Australian Competition & Consumer Commission v Pauls Ltd* (2003) ATPR 41-911, 46,621; *Australian Competition & Consumer Commission v Leahy Petroleum* [2004] FCA 1678, [46]; and

competition has no coherent economic or other rationale: the question is whether the conduct is anti-competitive, not whether it is necessarily pro-competitive. If it is thought that the definition of price fixing should exclude conduct that is not anti-competitive, a far preferable approach would be to require an intention on the part of the alleged principal offenders to lessen competition between them.⁶⁹ Such a requirement is included in the suggested definition of a cartel provision where the provision is an exclusionary provision (see (2)(b) above).

- Unlike ss 44ZZRF and 44ZZRG, the provisions outlined above specify the required fault elements instead of implying them on the basis of the general fault principles of the *Criminal Code* (Cth).⁷⁰
- The requirement of intention means intention in the sense defined in s 5.2 of the *Criminal Code* (Cth).⁷¹ The requirement of an intention to fix prices or lessen competition is an ulterior intention that, on one view, is not subject to s 5.2(3) of the *Criminal Code* (Cth) and bears its dictionary meaning.⁷² If the extended definition of intention under the Code is to apply, that needs to be made clear. There is a good case for limiting intention with respect to a result to intention in the sense that the accused means to bring it about and

Australian Competition & Consumer Commission v CC (NSW) Pty Ltd (1999) ATPR 41-732, 43,511-43,512. However, in none of the cases cited was the possible improvement of competition a relevant issue, nor did any endorse the proposition that a provision that “improves competition” is not price-fixing. In *ACCC v Pauls Ltd* [2002] FCA 1586 at [97], O’Loughlin J agreed with Lockhart J that care was needed in characterising conduct as price-fixing under s 45A(1) but did not say that conduct is not to be characterised as price-fixing unless it “improves competition”. Similarly, in *ACCC v Leahy Petroleum* [2004] FCA 1678 Merkel J at [46] avoided mention of Lockhart’s dictum that s 45A(1) does not apply unless a provision “improves competition”. In *ACCC v CC (NSW) Pty Ltd* [1999] FCA 954 at [180] Lindgren J referred to Lockhart J’s dictum but did not express any view on whether the dictum was sound or unsound; there is no apparent basis for saying that the dictum was “favourably cited”.

⁶⁹ As required in *US v Joint-Traffic Association*, 171 US 505, 508-509 (1898). See further O Odudu, "The Role of Specific Intent in Section 1 of the Sherman Act" (2002) 25 World Competition 463.

⁷⁰ Consistently with the recommendation in Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, Report No 95 (2002) [11.54], 405, <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/> viewed 14 February 2008.

⁷¹ For a commentary, see S Odgers, *Federal Criminal Law* (Lawbook Co, 2007) 36-42.

⁷² Attorney-General’s Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) p 53. For the opposing view that the Code definition of intention applies more generally and to an ulterior intention of kind relevant here, see Odgers S, *Principles of Federal Criminal Law* (Thomson Lawbook Co., 2007) pp 36-38. See further I Leader-Elliott, "Benthamite Reflections on Codification of General Principles of Criminal Liability: Towards the Panopticon" (2006) 9 Buffalo Criminal LR 101 at 139-142.

deleting the extended definition under s 5.2.3(c) (ie deleting "or is aware that it will occur in the ordinary course of events").⁷³

- The physical element of “making” a contract or “giving effect to” a cartel provision is *conduct* within the meaning of the *Criminal Code*. The physical elements that the provision be a “cartel provision”, and that it be “contained in” the relevant contract, arrangement or understanding, are *circumstances*. The physical element that the alleged principal offenders be in competition with each other is a *circumstance*. The effect that must be intended under the definition of a cartel provision (eg the effect of price fixing) is a *result*.
- The provisions above explicitly require knowledge or belief in relation to the circumstances specified in the definition of the offence. This reflects the position that it is preferable for the fault elements to be explicit rather than implicit.⁷⁴ “Knowledge” is as defined in s 5.3 of the *Criminal Code* (Cth): “[a] person has knowledge of a circumstance or a result of he or she is aware that it exists or will exist in the ordinary course of events.”
- The meaning of “intention” in situations where an accused has multiple intentions requires a provision parallel to s 4F.⁷⁵
- The offence of giving effect to collusive market subversion should apply where the contract or arrangement was made or the understanding was arrived at before the commencement of the provisions creating the offence.⁷⁶
- The defence of legitimate primary intention under provision (4)(a) seeks to avoid over-reach by enabling liability for a cartel offence to be denied where the cartel provision is ancillary to co-operative efficiency-enhancing conduct. The concept of a "primary intention" is intended to reflect Taft J's formulation

⁷³ See further I Leader-Elliott, “Negotiating Intentions in Trials of Guilt and Punishment” in N Naffine, R Owens & J Williams eds), *Intention in Law and Philosophy* (Ashgate, 2001) 73.

⁷⁴ Consistently with the recommendation in Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, Report No 95 (2002) [11.54], 405, <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/> viewed 14 February 2008.

⁷⁵ Contrast the possibility of a sole intention test corresponding to the sole purpose test adopted in *US v Addyston Pipe & Steel Co*, 85 Fed 271 at 282-283 (1898); *Dr Miles Medical Co v John D Park & Sons Co*, 220 US 373 (1911).

⁷⁶ As under EDB s 44ZZRG(3).

of the principle of an ancillary restraint in *US v Addyston Pipe & Steel Co.*⁷⁷ a restraint is ancillary and not naked where the "main purpose" of the restraint is to make a separate legitimate transaction more effective. The defence under 4(a) does not require a "joint venture" or the application of a competition test (contrast the joint venture defence under s 76C and s 76D) but, like ss 76C and 76D, places an affirmative as well as evidentiary burden of proof on the person seeking to rely on the defence.

- The defence of legitimate primary intention under provisions (4)(b) and (c) seek to avoid over-reach by enabling liability for a cartel offence to be denied where the cartel provision is ancillary to certain forms of cooperative activity that are plainly in the public interest.⁷⁸ Little attention has been paid to the implications of the present per se civil penalty prohibitions in the context of collective action by competitors to refuse supply to terrorist organisations or to take action to protect the environment. Nor has sufficient attention been paid to the implications of those prohibitions in other contexts, including group action by competitors against infringements of intellectual property⁷⁹ or the group settlement of litigation. The defence under provisions 4(b) and (c) do not seek to cover all possible situations where an exemption might be justified as a matter of policy but attempt to close the most glaring gaps in the current array of defences and exemptions. See the examples discussed in Part 4.3 below.
- "Intention" in "primary intention" under provision (4) requires the accused to mean to bring about a relevant result within (4)(a)(b) or (c) - it does not mean intention in the extended sense of awareness that the result "will occur in the ordinary course of events" (contrast s 5.2(3) of the *Criminal Code* (Cth)).
- It is debatable whether the defence of legitimate primary intention should be an affirmative defence or impose only an evidentiary burden on the accused.

⁷⁷ 85 Fed 271 at 282-283 (1898). See further RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1993) 26-30, 135-136, ch 13.

⁷⁸ To similar effect, see the principle of public interest ancillarity under EC competition law: see J Faull & A Nikpay, *The EC Law of Competition* (2nd ed, 2007) 237-239. In some cases the rule of reason in US antitrust law has been extended to take account of social justifications; see American Bar Association, *Antitrust Developments* (6th ed, 2006) vol 1, ch 1(3). But see JH Adler, "Conservation through Collusion: Antitrust as an Obstacle to Marine Resource Conservation" (2004) 61 *Washington & Lee LR* 3.

⁷⁹ Compare *Fashion Originators' Guild of America v FTC*, 312 US 457 (1941) as criticised in RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1993) 338-339.

The same applies to the joint venture defence in its applicable to the cartel offences.

4. OVER-REACH

This Part discusses:

- the need to avoid over-reach (Part 4.1);
- the excessively broad physical elements of the EDB cartel offences – price fixing (Part 4.2);
- the excessively broad physical elements of the EDB cartel offences – restriction of output and allocation of customers (Part 4.3);
- the excessively broad physical elements of the EDB cartel offences – bid-rigging (Part 4.4);
- the weak competition condition under the EDB cartel offences (Part 4.5);
- the unjustified application of the EDB cartel offences to vertical arrangements (Part 4.6);
- the over-reach of the EDB cartel offences through inadequate fault elements (Part 4.7);
- the absence of a joint venture defence (Part 4.8);
- the absence of exemptions for collective buying and joint marketing (Part 4.9);
- the extended definition of “party” to include a related corporation (Part 4.10);
and
- the questionable application of conspiracy to the EDB cartel offences (Part 4.11).

Responsive solutions are suggested in relation to each manifestation of over-reach.

4.1 The need to avoid over-reach

As previously stated, it is axiomatic that offences should be defined no more broadly than is necessary to cover the conduct that warrants criminal prohibition.⁸⁰

The EDB cartel offences violate this principle in many significant respects.⁸¹ These violations are not cured by the element of dishonesty, a crude filter the operation of which is anyone's guess; see Part 5.2 below.

4.2 Excessively broad physical elements of the EDB cartel offences – price fixing

The physical elements of the cartel offences under the EDB are defined so broadly in relation to price fixing as to catch conduct that is not serious cartel conduct in any plausible sense:

- The definition of price fixing in s 44ZZRD(2)(a) does not exclude situations where, as in case brought by the ACCC against National Australia Bank Limited in 2000 in the credit card interchange fee matter,⁸² A and B enter into a CAU for the supply of services in an upstream market where they do not compete with each other and a provision of the CAU has the likely effect of controlling the price of goods or services in a downstream market where they do compete. Submissions were made to the Dawson Committee that this type of conduct should not be treated as an offence.⁸³ There is much force in that position.⁸⁴
- No attempt has been made to delimit what is meant by the words “fixing, controlling or maintaining” a price in the definition of price-fixing in s 44ZZRD(2)(a). The proposition of Lindgren J in *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd*⁸⁵ that degrees of control are irrelevant when determining if a provision has the effect of “controlling” a

⁸⁰ A Ashworth, *Principles of Criminal Law* (5th ed, 2006) 30-35.

⁸¹ Many of the same arguments can be made in respect of the existing and proposed per se civil penalty prohibitions but are stronger in the context of criminal liability.

⁸² Federal Court of Australia, *Statement of Claim* (No N948 of 2000).

⁸³ See *Supplementary Submissions to Dawson Committee Released by the ACCC after FOI Application by Brent Fisse & Lexpert Publications Pty Ltd* (9 October 2007), <http://www.brentfisse.com/images/AcccsupplementarysubmissionstoDawsonCommittee2002.pdf> viewed 14 February 2008.

⁸⁴ The requirement of dishonesty under the EDB cartel offences would not necessarily exclude such situations and, in any event, would be an obscure and ham-fisted attempt at a solution.

⁸⁵ (1999) 92 FCR 375 at [178].

price⁸⁶ is sweeping. It is also inconsistent with the dictionary meaning of “to control”, which is “to hold sway over, exercise power or authority over, to dominate or command.”⁸⁷

- The definition of price fixing in s 44ZZRD(2) does not exclude maximum price fixing by sellers. There is no cogent policy justification for so broad a per se prohibition, civil or criminal.⁸⁸

These over-reaching branches of price fixing are not difficult to prune:

- (1) The offence suggested in Part 3 above requires the alleged principal offenders to be competitors at all levels of the supply, production or distribution chain to which the contract, arrangement or understanding and the cartel provision relate. The offence would not apply where, as illustrated by the NAB credit card interchange fee case, the alleged principal offenders do not compete at the level of an input supply contract containing the alleged cartel provision but only in a downstream market.
- (2) An intention to control or maintain a price can be defined to require an intention that the alleged cartel provision will exert a major contributing influence on the relevant price.
- (3) “Price” can be defined to exclude a maximum price.

4.3 Excessively broad physical elements of the EDB cartel offences - restriction of output and allocation of customers

The physical elements of the cartel offences under the EDB are defined so broadly in relation to restriction of output and allocation of customers as to catch conduct that does not amount to serious cartel conduct in any plausible sense:

⁸⁶ Contrast *Australian Competition and Consumer Commission v The Australian Medical Association Western Australia Branch Inc* (2003) ATPR 41-195 at [195] where Carr J disagreed with the view expressed by Lindgren J..

⁸⁷ See *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) ATPR 40-071 at 17,715; *Re Insurance Council of New Zealand (Inc)* (1989) 2 NZBLC (Com) 99-522 at 104,482.

⁸⁸ See FH Easterbrook, “Maximum Price Fixing” (1981) 48 *U Chi L Rev* 886.

- Defining the physical elements of a cartel offence in terms of restriction of output (s 44ZZRD(2)(b)) does not exclude liability in cases where the restriction is not anti-competitive or is positive in terms of consumer welfare. Examples proliferate. They include the situation where competing suppliers of fuel agree:
 - (a) to reduce the use of ethanol in order to ease the demand for corn and other food-stock and thereby reduce the price of food; and
 - (b) to switch production to methane-based fuels using methane from the abundant supply available from inactive coal mines and active pig farms.

In this example, the parties agree to restrict the supply of goods within the meaning of s 44ZZRD(2)(b)(iii). Such conduct is not serious cartel conduct.

- Assume that competing suppliers of plastic explosive agree to refuse supply to a terrorist organisation. Again, this is a restriction of supply within the over-reach of s 44ZZRD(2)(b)(iii).
- Assume that a hurricane strikes Cairns and is causing extreme flooding and devastating damage to public and private buildings and other facilities. Building contractors, concerned about by the delay or insufficiency of governmental action, stop competing with each other and create a recovery plan under which they agree to deploy all their resources on agreed priority recovery projects. The hurricane is on the radar, not the highly theoretical possibility of applying to the ACCC for an authorisation. Valuable as this private sector initiative is, it involves a restriction of supply within the clutch of s 44ZZRD(2)(b)(iii).
- Pengilley has given the telling example of the over-reach of s 4D where a local television blackout of a sporting event is imposed in order to attract the crowds necessary to make the event commercially feasible.⁸⁹

Suppose a group of horse racing clubs agree to allow closed-circuit telecasting of races to social clubs, hotels, motels, racetracks and other institutions but a term of the agreement is that local races are not to be telecast in the local area. The reason for this restriction is that the local horse racing clubs wish to retain racetrack crowds. Without such crowds, local race

⁸⁹ W Pengilley, *Price Fixing and Exclusionary Provisions* (Prospect, 2001) 104-105.

meetings would be less successful and it is not inconceivable that the subject matter of the telecast itself (that is, races) could cease to exist.

All of the above reasons in favour of home town 'blackouts' have led to the conclusion in the US that such jointly agreed TV 'blackouts' are not anticompetitive. Indeed, the home town blackout restriction 'promotes competition more than it restrains it'. In Australia, a *per se* ban on such jointly agreed arrangements may, however, be the result. There is no doubt that the immediate purpose is to deny services to certain identifiable persons or institutions. There appears to be little doubt that the various horse racing clubs are competitive with each other (they compete for sponsorships, entries and prize money offered and, highly relevant in the present context, for TV coverage and payments for such coverage). While the blackout certainly does not substantially lessen competition between the horse racing clubs in those matters in respect of which they compete, this is not the relevant test for infringement of the Australian exclusionary provision legislation.

Making an arrangement illegal along the above lines defies economic or any other form of common sense. It is no answer to say that authorisation for such a practice is available, although one would think, in fact, that the chances of such an authorisation, in the circumstances stated, must be reasonable. What has happened is that the Australian legislative draftsman has done something which the US courts have declined to do — that is, he or she has swept up reasonable pro-competitive activity within a general condemnation. Certainly there is no conceivable evidence that an arrangement for joint telecasting with local blackout restraints should be deemed to be a naked restraint of commerce with no purpose except the stifling of competition. Yet the Australian *Trade Practices Act* so deems.

The conduct described in this example would also be caught by the broad definition of restricting or limiting supply in s 44ZZRD(2)(b)(iii) of the EDB – the restriction of the supply of the rights to televise the rights locally is a restriction of the supply of services to local television stations.

- Assume that competing aviation companies provide helicopter services for medical emergencies in rural areas at cost or on a subsidised basis. They arrange a system under which each agrees to provide a minimum guaranteed level of emergency transport services for patients in different geographical areas. All of the parties are

free to provide additional services whenever they wish to do so, whether on a subsidised or full price basis. Plainly this customer allocation scheme is caught by s 44ZZRD(2)(c)(iii): the geographical areas in which services are supplied, or likely to be supplied, have been allocated by the parties to the contract, arrangement or understanding.⁹⁰

The per se prohibition of restriction on output and allocation of customers under the EDB is not limited to situations where the defendant acted for the purpose of restricting output or allocating customers but extends to situations where the effect or likely effect of the cartel provision is to restrict output or allocate customers (contrast the purpose-based test under s 4D).⁹¹ This extension of liability causes or compounds the problems of over-reach illustrated above.

It is irrelevant under s 44ZZRD(2)(b) and (c) whether or not the restriction of output or the allocation of customers is targeted at competitors. The Dawson Committee recommended that s 4D be amended by including such a restriction (following s 29 of the *Commerce Act* 1986 (NZ)).⁹² However, that recommendation is questionable. It lacks a clear economic foundation and is inconsistent with US antitrust law on group boycotts; under s 1 of the *Sherman Act*, market sharing is treated as a naked restraint in some circumstances.⁹³

The over-reach of the EDB cartel offences is avoidable by taking the s 4D definition of an exclusionary provision as a starting point and revising that definition to reflect the underlying economic rationale for per se prohibition of such conduct.⁹⁴ The offence of collusive market subversion suggested in Part 3 above would define the exclusionary provision element of a cartel provision as follows:

[the provision must be] intended by the corporation and the competitor to lessen competition between the corporation and the competitor, or between the corporation or the competitor and a third party competitor, by restricting or preventing the supply

⁹⁰ The wording is unqualified and does not exempt roster schemes. Note 1 to s 44ZZRD states that “subparagraph (2)(b)(iii) will not apply in relation to a roster for the supply of after-hours medical services if the roster does not prevent, restrict or limit the supply of services.” However, the likely effect of many roster schemes will be to restrict the supply of services.

⁹¹ For a critique, see Issues Paper, Part 5.3.1 C & D.

⁹² Trade Practices Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) 128. See also W Pengilley, *Price Fixing and Exclusionary Provisions* (Prospect, 2001) Attachments 1-2.

⁹³ See W Reid, “Exclusionary Provisions – Dead, Alive or Living in Mexico?” (2003) Law Council of Australia, Trade Practices Committee Workshop.

⁹⁴ See P Areeda & H Hovenkamp, *Antitrust Law*, chs 19B, 20D, 22A.

or acquisition of goods or services by the corporation or the competitor, either generally or in particular circumstances or on particular conditions, in competition with each other.

A defence of legitimate primary intention is also suggested in Part 3 above (see provision (4)).

This approach would avoid over-reach in the examples given above:

- The competing suppliers of fuel in the ethanol example do intend to restrict the supply of ethanol as a fuel and each supplier thereby intends to lessen competition by the other in relation to the supply of ethanol fuel. However, their primary intention is to achieve the use of environmentally sustainable resources and hence they would have a defence of legitimate primary intention under provision (4)(a) in Part 3.1 above.
- Refusal by competing manufacturers of plastic explosive to supply their explosives to a terrorist organisation would involve a restriction of supply with an intention to lessen competition between the suppliers. However, the primary intention of the parties is to prevent a serious risk to human life or public safety and hence they would have a defence of legitimate primary intention under provision (4)(b) or in Part 3.1 above.
- Building contractors in a hurricane-struck city who stop competing and collectively plan and implement work on recovery projects would have a defence of legitimate primary intention under provision (4)(b) or (4)(c) in Part 3.1 above.
- In the sporting blackout example given by Pengilley there is no intention to lessen competition between competitors: the blackout is for the purpose of conducting a viable business. Alternatively, the parties could rely on the defence of legitimate primary intention by showing that their primary intention was to increase the output of goods or services or to improve their quality (see provision (4)(a) in Part 3.1 above).
- In the example given of scheduled minimum helicopter services for medical emergencies the competitors do not have an intention to lessen competition between each other. They intend to provide a minimum guaranteed level of

emergency service in specified geographical areas. All of the competing helicopter companies are free to provide additional services whenever they wish to do so, whether on a subsidised or full price basis. Alternatively, the parties could rely on the defence of legitimate primary intention by showing that their intention was to prevent a serious risk to human life or to remedy serious physical harm occasioned to a person (see provision (4)(b) in Part 3.1 above).

4.4 Excessively broad physical elements of the EDB cartel offences – bid-rigging

The definition of bid rigging under the EDB proscribes various types of conduct in response to a request for bids without also requiring that the intended effect or likely effect necessarily be to control a price or foreclose competitive conduct. For example, consider the scope of s 44ZZRD(2)(v). The purpose/effect condition required for a cartel provision is satisfied if the provision has the purpose, effect or likely effect of ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:

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

Assume that A and B, two of 5 competing suppliers and installers of desalination plants in Australia, are requested by the NSW government to bid for several new plants. A manufactures distillation units. B manufactures pumps. A wants to use B's technology for the bid and B wants to use A's technology. They discuss supply arrangements for the bid and agree to supply each other at a mutual discounted rate in order to improve each other's chance of winning the tender. The input cost of A's technology is a material component of B's bid. The input cost of B's technology is a material component of A's bid. Since the discounted rate applicable to A's technology and B's technology has been worked out in accordance with an arrangement between A and B, the mutual discount provision is caught by s 44ZZRD(2)(v). There is no joint venture between A and B and, in any event, the cartel offence under s 44ZZRF is not subject to a joint venture defence.⁹⁵ Whether or not such conduct would be found to be "dishonest" by a jury is impossible to predict.⁹⁶

⁹⁵ See Part 4.8 below.

⁹⁶ See Part 5.2 below.

The bid-rigging provisions are unnecessary and should be abandoned. Bid rigging is covered by the existing per se civil penalty prohibitions against price fixing and exclusionary provisions and would be covered by a cartel offence that is defined by taking those existing provisions as a starting point and adapting them so as to avoid over-reach. See the cartel offences suggested in Part 3 and the discussion in Part 4.3.

4.5 Weak competition condition under the EDB cartel offences

The competition condition under the EDB cartel offences requires that only two or more of the parties to the contract, arrangement or understanding be in competition with each other, consistent with the position under the existing per se civil penalty prohibitions.⁹⁷ This condition fails to capture a critical facet of serious cartel conduct, which is that the conduct is engaged in by competitors (or employees acting on behalf of competitors).

Assume that 10 corporations agree to a market division scheme but that only two of the corporations are competitors or likely competitors. All 10 corporations are not at the core of the serious cartel conduct – 8 of the 10 corporations are at most accomplices in the cartel conduct.

This type of over-reach is easily cured by requiring that all of the parties alleged to have entered into a criminal cartel be competitors or likely competitors. Such a requirement is included in the offence of collusive market subversion suggested in Part 3.

4.6 Unjustified application of the EDB cartel offences to vertical arrangements

The exemption of exclusive dealing conduct from the application of the prohibitions against s 45 under 45(6) is not carried over to the cartel offences under the EDB. Re-supply situations are covered by the definition of a cartel provision in s 44ZZRD(2). The cartel offences will thus apply to vertical relationships between competitors where a supply contract is subject to exclusive dealing conditions and where the exclusive dealing conditions entail price fixing, restriction of output or allocation of customers.

Assume that A, a manufacturer of disc brakes, enters into a contract with B for the supply of disc brakes to be used in the production of passenger cars. A and B compete against each other in the wholesale market for passenger cars. Supply under the contract is subject to the condition that B will not re-sell any of the disk brakes supplied to A to any other competitor

⁹⁷ EDB s 44ZZRD(3).

of A. Under s 45(6) of the TPA, this exclusive dealing conduct is not subject to the s 45 per se civil penalty prohibitions against price fixing and exclusionary provisions but is subject to the prohibition under s 47 against exclusive dealing that has the purpose, effect or likely effect of substantially lessening competition in a market. By contrast, under the EDB, the conduct is subject to the cartel offence of restriction of output: the exclusive dealing condition that B not re-sell the disc brakes to any other competitor of A is a prevention of supply to a person within the meaning of s 44ZZRD(2)b)(iii).

This sweeping expansion of per se liability under the EDB has never been discussed in any public official document. Nor is there any apparent justification for so radical a change.⁹⁸ Per se prohibitions are justifiable only if the conduct proscribed is likely to result in an increase in price or a reduction in output in almost all cases that fall within the proscription.⁹⁹ Plainly that is not the position under s 44ZZRD(2)(b) or (c): many vertical arrangements will not result in a price increase or a reduction in output and indeed many will increase consumer welfare.

The cure required is the exclusion of supply and other vertical arrangements from the application of the cartel offences. There needs to be a provision comparable to s 45(6) but drafted so as to avoid the arbitrarily narrow focus on conduct that happens to be exclusive dealing conduct as defined in s 47.¹⁰⁰

4.7 Over-reach of the EDB cartel offences through inadequate fault elements

The fault elements of the EDB cartel offences are inadequate. They open up liability for some forms of conduct that do not warrant criminalisation.

- The purpose component of the purpose/effect condition requirement for cartel offences may require purpose merely on the part of “each of the parties responsible for including” the cartel provision in the contract, arrangement or

⁹⁸ There was no discussion of any need for change by the Dawson Committee. The change was not foreshadowed in the Treasurer’s press release in February 2005 announcing that new cartel provisions would be introduced. The Working Party Report may have discussed the issue but is not a public document.

⁹⁹ See P Areeda & H Hovenkamp, *Antitrust Law*, §2033.

¹⁰⁰ See W Pengilley, “Thirty Years of the Trade Practices Act: Some Thematic Conclusions” (2004) 12 CCLJ 6 at [73]-[76] where it is also argued that s 47 serves no useful role (as is evident from the absence of any such provision in the *Commerce Act* 1986 (NZ)) and should be repealed.

understanding¹⁰¹ or purpose on the part of only one of the parties to the contract, arrangement or understanding.¹⁰² On either of these possible interpretations, the element of purpose is a token requirement far removed from the underlying concept of serious cartel conduct. The orthodox understanding of serious cartel conduct is that all parties are competitors acting together for the shared or common purpose of price fixing or reducing output. However, the case-law suggests that s 44ZZRD(2) is unlikely to be interpreted as requiring a common purpose on the part of all parties to the contract, arrangement or understanding containing a cartel provision. If so, the element of “purpose” is illusory and incapable of limiting the scope of the cartel offences to serious cartel conduct.

- The EDB cartel offences require recklessness in relation to:
 - (a) the existence of a cartel provision in a contract, arrangement or understanding
 - (b) the effect or likely effect of price fixing, reduction of output, allocation of customers or bid-rigging; and
 - (c) the competitive status of two or more parties to the contract, arrangement or understanding.

Recklessness applies to these elements of the EDB cartel offences as a result of the operation of the general fault principles of the *Criminal Code* (Cth). Recklessness as defined in the Code applies to a circumstance (a) and (c) above) or a result (b) above) unless the statutory provisions specify otherwise.

Recklessness as defined in s 5.4(1) and (2) of the *Criminal Code* (Cth) requires: (i) awareness of a substantial risk that a circumstance exists or that a result will occur; and (ii) the unjustifiable taking of that risk on the facts known to the accused.¹⁰³ Recklessness so defined is a low threshold for

¹⁰¹ *Seven Network Limited v News Limited* [2007] FCA 1062 at [2402] ff. Contrast the requirement of a common purpose on the part of all parties to the contract, arrangement or understanding in *Carlton & United Breweries (NSW) Pty Ltd v Bond Brewing NSW Ltd* (1987) ATPR [40-820] at [48,880].

¹⁰² *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (1990) 27 FCR 460.

¹⁰³ *Criminal Code* (Cth) s 5.4. For an incisive critique of the concept of recklessness in Australian criminal law see I Leader-Elliott, “Recklessness and the Moral Desiccation of the Australian Law of Murder,” in J Horder (ed), *Homicide Law in Comparative Perspective* (Hart Publishing, 2007).

criminal liability. The degree of risk of which the accused must be aware for recklessness under the *Criminal Code* (Cth) (a “substantial risk”) is low. Under s 44ZZRD(2) the risk is even lower where an accused is prosecuted on the basis that the “likely” effect was for example to fix a price: “likely” includes a possibility that is not remote (s 44ZZRB) and hence the requirement of recklessness can be satisfied on the basis that the accused was aware of a substantial risk that there was a non-remote possibility that the cartel provision would control a price. By contrast, in *US v United States Gypsum Co*,¹⁰⁴ the United States Supreme Court held that the offence under s 1 of the *Sherman Act* 1890 (US) required proof of intention or knowledge of the probable consequences (in the case of price fixing, knowledge of the probability that the arrangement would result in the fixing of prices).

Responsive solutions:

- The concept of “purpose of a provision” is best abandoned. The approach taken in the offence of collusive market subversion suggested in Part 3 is to require intention (eg an intention to fix prices) on the part of all the parties alleged to be principal offenders. This mirrors the decision in *Gerakiteys v The Queen*¹⁰⁵ where the High Court of Australia held that conspiracy at common law requires that all parties to a conspiracy have a mutually shared intention to achieve the object of the conspiracy.¹⁰⁶ Similarly, ss 188(1) and (2) of the *Enterprise Act* 2002 (UK) require an intention on the part of each and every accused to achieve the price fixing, bid rigging or other particular form of cartel conduct alleged.
- Intention should be required, not merely recklessness, for the reasons expressed above. Superficially, this may seem inconsistent with the views expressed by the United States Supreme Court in *US v United States Gypsum Co* as to the suitability or otherwise of intention as the fault element of the offences under s 1 of the *Sherman Act* (US):¹⁰⁷

¹⁰⁴ 438 US 422 (1978). See further American Bar Association, *Criminal Antitrust Litigation Handbook* (2nd ed, 2006) 301-303.

¹⁰⁵ (1983) 153 CLR 317.

¹⁰⁶ See further B Fisse, *Howard's Criminal Law* (5th ed, Lawbook Co, 1990) 370-375.

¹⁰⁷ 438 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.”

However, the views of the US Supreme Court do not mean that intention is unworkable as a fault element of a cartel offence in Australia. First, if “intention” is defined to mean that a person “has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events”, as under s 5.2(3) of the *Criminal Code* (Cth), there is no need for proof of a “conscious desire to bring [a result such as price fixing] to fruition.” Secondly, the Supreme Court’s reluctance to require an intention to bring about “a restraint of trade” is readily understandable in the context of s 1 of the *Sherman Act* given that such a fault element would be value-laden and ill-defined; by contrast, the offence suggested in Part 2.6 above is defined in very different and more precise terms. Thirdly, there is no suggestion in Australia that a requirement of intention would enable an accused to deny liability on the basis of ignorance or mistake of law – see s 9.3 of the *Criminal Code* (Cth).

4.8 Absence of a joint venture defence

The EDB cartel offences are not subject to any joint venture defence akin to that now provided under ss 76C and 76D. The joint venture defence under s 44ZZRO applies only to the new civil penalty prohibitions under ss 44ZZRJ and 44ZZRK.

The absence of a joint venture defence is highly controversial. Joint ventures and other co-operative arrangements are very common. Any definition of per se prohibitions against cartel

conduct inevitably will catch price fixing or other restrictions that are not anti-competitive or which have positive welfare effects.¹⁰⁸

Perhaps the intention of the EDB is that legitimate joint ventures will fall outside the scope of the new cartel offences because the parties will not intend dishonestly to obtain a benefit. Denials of dishonesty may well succeed in some joint venture cases. However, the concept of an intention dishonestly to obtain a benefit is so ill-defined and so oblique a way of testing whether or not a joint venture is anti-competitive that errors are inevitable, including convictions in cases where a defence under s 76C or 76D would succeed if such a defence were available.

A joint venture defence should therefore apply to the cartel offences. The joint venture defence under s 76C and s 76D are defined in vague terms¹⁰⁹ and, as I have recommended elsewhere, should be redefined for the purposes of both the cartel offences and the per se civil penalty prohibitions.¹¹⁰

4.9 Absence of exemptions for collective buying and joint marketing

The EDB dispenses with the exemptions for collective buying and joint marketing that now apply to price fixing under s 45A(4).

There is no justification for a per se prohibition against price fixing in the context of genuine collective buying or joint marketing arrangements.¹¹¹ The failure of the EDB to exempt such arrangements from the cartel offences results in an obvious and significant area of over-reach.

¹⁰⁸ See A Harpham, D Robertson & P Williams, “The Competition Law Analysis of Collaborative Structures” (2006) 34 ABLR 399.

¹⁰⁹ For example, “joint venture” needs to be defined. The definition proposed by Pengilly in “Thirty Years of the Trade Practices Act: Some Thematic Conclusions” (2004) 12 CCLJ 6 at [46]-[47] is commendable:

- (i) A reference to a joint venture is a reference to an activity in trade or commerce carried on between two or more parties whether carried on in partnership or by a body corporate formed by them; and
- (ii) the activity carried on is one in which there is substantial integration of the parties' production, management, distribution, finance or other resources, or a significant number of these resources with the objective of producing goods or services by way of a joint activity between them using in common the resources contributed by each of them.

¹¹⁰ B Fisse, “The Joint Venture Defences under Sections 76C and 76D of the Trade Practices Act” (15 May 2008), at www.brentfisse.com/publications.html.

¹¹¹ See P Areeda & H Hovenkamp, *Antitrust Law*, §2135, §2023.

The exemptions under s 45A(4) should be extended so as to apply to the cartel offences, in the context of exclusionary provisions as well as that of price fixing.

4.10 Extended definition of “party” to include a related corporation

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

Unlike liability for being knowingly concerned in an offence under s 79(1)(c), liability for a new cartel offence will not require proof that the accused related corporation was concerned in and had a “practical connection” with the offence. Nor will liability for the new cartel offence under s 44ZZRF require knowledge by the accused related corporation that a contract, arrangement or understanding was entered into by a subsidiary or that the contract, arrangement or understanding contains a cartel provision.¹¹² Recklessness will be sufficient in relation to those circumstances. Recklessness as defined in s 5.4(1) of the *Criminal Code* (Cth) requires merely the accused be “aware of a substantial risk that the circumstance exists or will exist” and “having regard to the circumstances known to him or her, it is unjustifiable to take that risk.”

The extended definition of “party” in s 44ZZRC is much less likely to result in over-reach if intention is required for the fault element of the cartel offences. Intention is required for the offences of collusive market subversion suggested in Part 3 above.

4.11 Questionable application of conspiracy to the EDB cartel offences

A conspiracy to commit a cartel offence under s 44ZZRF or s 44ZZRG of the EDB is an offence under s 79(1)(d) of the EDB and presumably also a conspiracy under the *Criminal Code* (Cth) (s 6AA of the EDB does not exclude the application of Part 2.4 of the *Criminal Code*).

¹¹² If criminal liability were to be limited to liability as a secondary party under s 79 of the *Trade Practices Act* 1974 (Cth) a related corporation would be liable only if it had knowledge of the “essential matters” constituting the principal offence, as distinct from merely recklessness as to those matters. See *Giorgianni v R* (1985) 156 CLR 473; *Yorke v Lucas* (1985) 158 CLR 661; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53; B Fisse, “Complicity in Regulatory Offences” (1968) 6 MULR 278.

The proposed offence of conspiracy to commit a cartel offence is controversial.¹¹³ The cartel offences under the EDB are inchoate offences akin to conspiracy. The cartel offences do not necessarily require the actual fixing of prices, reduction of output, allocation of customers or rigging of bids – it is sufficient that two or more competitors have entered into a contract, arrangement or understanding containing a cartel provision that has the purpose or likely effect of fixing prices, reducing output, allocating customers or rigging bids. In effect, the EDB makes a conspiracy to commit a conspiracy an offence. The doubling up of inchoate liability in the criminal law is both unnecessary and oppressive and has been strongly criticised on those grounds.¹¹⁴ In the particular context of the EDB, there is no apparent justification for extending liability for conspiracy to the cartel offences.

The potential application of conspiracy to the cartel offences can and should be excluded by a provision comparable to s 11.4(5) of the *Criminal Code* (Cth). Section 11.4(5) excludes double inchoate liability in the context of the offence of incitement; it excludes liability for incitement to incite, incitement to attempt, and incitement to conspire. The conspiracy provisions in s 11.5 of the *Criminal Code* do not exclude the possibility of liability for a conspiracy to commit a conspiracy but include other safeguards (most notably the power of a court to dismiss a conspiracy charge where the interests of justice so require). The safeguards under s 11.5 do not apply to conspiracy under s 79(1)(d) of the EDB.

¹¹³ As evident from the attempt to superimpose general criminal code conspiracy provisions on s 1 of the *Sherman Act* under US Senate Bill S.1 (1973); see M Crane, "Substantive Changes" (1973) 43 *Antitrust LJ* 399 at 406.

¹¹⁴ See I Robbins, "Double Inchoate Crimes" (1989) 26 *Harv Jnl on Legislation* 1; P Glazebrook, "Should We Have a Law of Attempted Crime?" (1969) 85 *LQR* 28.

5. UNCERTAINTY AND DIFFICULTY OF APPLICATION

This Part discusses:

- the need for certainty and ease of application (Part 5.1);
- the vagueness of the element of dishonesty in the EDB cartel offences (Part 5.2);
- the ambiguity of the wording “purpose of a cartel provision” (Part 5.3);
- the vagary of the concept of unjustified risk in the element of recklessness (Part 5.4);
- the differing possible interpretations of “fixing, controlling or maintaining” a price (Part 5.5);
- the uncertainty of the concept of an “allocation” of customers (Part 5.6); and
- the questionable workability of the EDB cartel offences in jury trials (Part 5.7);

Responsive solutions are suggested throughout.

5.1 The need for certainty and ease of application

Certainty and ease of application by corporations and their advisers, investigators, prosecutors, judges and jurors are fundamental desiderata for the definition of offences. As Ashworth has explained:¹¹⁵

[A] person's ability to know of the existence and extent of a rule is fundamental: respect for the citizen as a rational, autonomous individual and as a person with social and political duties requires fair warning of the criminal law's provisions and no undue difficulty in ascertaining them. ... if rules are vaguely drafted, they bestow considerable power on the agents of law enforcement:" the police or other agencies might use a widely framed offence to criminalize behaviour not envisaged by the

¹¹⁵ A Ashworth, *Principles of Criminal Law* (5th ed, 2006) 76.

legislature, creating the very kind of arbitrariness that rule-of law values should safeguard. The offence takes on the definition of the law enforcement agents instead of one provided by the legislators ... Thus, if taken seriously, the principle should contribute to the control of discretion as well as to fair warning for citizens.

As explained below, uncertainty and difficulty of application are serious concerns raised by the EDB cartel offences.

5.2 The vagueness of the element of dishonesty in the EDB cartel offences

Dishonesty under the *Ghosh* test adopted in the EDB cartel offences requires that the conduct be dishonest according to the standards of ordinary people and that the accused knew that the conduct was dishonest according to those standards.¹¹⁶ The *Ghosh* test has been workable in the context of theft and related offences against property given that the standards of conduct expected in that context have evolved over centuries and generally are well understood within the community. By contrast, the cartel offences are relatively novel and have not been subject to the same process of crystallisation of expected standards of conduct. Reliance on the concept of dishonesty in this context is a recipe for uncertainty:

- The “standards of ordinary people” limb of the element of dishonesty is an undefined and indefinable populist notion the practical application of which will create difficulties for judges and juries as well as for people in business and their advisers.¹¹⁷ Judges will be prone to commit a misdirection if they attempt to define what is meant by “dishonesty”, even where a jury grappling with the *Ghosh* test pleads for further guidance. Recent empirical research indicates that even serious cartel conduct may not be regarded as “dishonest” by jurors.¹¹⁸ People in business and their advisers will have little difficulty

¹¹⁶ *R v Ghosh* [1982] 2 All ER 68, as adopted in EDB s 44ZZRB.

¹¹⁷ See A Halpin, *Definition in the Criminal Law* (Hart Publishing, 2004), 150-166; A Ashworth, *Principles of Criminal Law* (5th ed, Oxford University Press, 2006), 405-409; EJ Griew, “Dishonesty: The Objections to Feely and Ghosh” [1985] *Criminal Law Review* 341; DW Elliott, “Dishonesty in Theft: A Dispensable Concept” [1982] *Criminal Law Review* 395; S Odgers, *Federal Criminal Law* (Lawbook Co., 2007), 33-36. The recent decision of the House of Lords in *Norris v The Government of the United States* [2008] UKHL 16 that simple price fixing (ie price fixing without additional deception) is not conspiracy to defraud compounds the ambiguity of “dishonesty” – ordinary people might believe that simple price fixing is not dishonesty if such conduct does not amount to conspiracy to defraud at common law.

¹¹⁸ A Stephan, *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain*, CCP Working Paper 07-12 (2007), <http://papers.ssrn.com/sol3/papers.cfm>, viewed 14 February 2008 (only 60% of respondents in a United Kingdom survey regarded price fixing as dishonest). See further C Beaton-Wells, “The Politics of Cartel Criminalization: A Pessimistic View from Australia” (2008) 3 ECLR

understanding that the cartel offences apply to blatant cases of price fixing and market sharing but will have no adequate guidance in many other situations including those involving joint ventures or collaborative arrangements between competitors.

- Moral ambiguity about the wrongfulness of price fixing or market sharing is inevitable where the conduct has occurred during an economic downturn and has been for the purpose of saving jobs.¹¹⁹ Ambivalence about the wrongfulness or otherwise of cartel conduct may also stem from the fact that such conduct may be authorised by the ACCC or immunised under the collective bargaining notice procedure. Moreover, confusion may arise from the fact that government-backed cartels have long been a feature of so-called market economies, including the Australian market economy.¹²⁰
- No one contends that the element of dishonesty will be difficult for jurors to apply in the most blatant cases of cartel conduct. The question is whether or not dishonesty is capable of differentiating clearly between blatant cases and cases on the boundary between criminal and civil liability and where criminal liability is not warranted. The concept of dishonesty obscures rather than delineates the boundary between criminal and civil liability. There is no reason to suppose that marginal cases or cases best left to civil liability will never be prosecuted.

The responsive solution to the uncertainty of the element of “dishonesty” in the EDB cartel offences is to dispense with the concept. A requirement of dishonesty serves no countervailing useful purpose:

- A requirement of dishonesty is incapable of sifting out the wheat of serious cartel conduct from the chaff of minor indiscretions – see Part 2.2.2 above.

185; A MacCulloch A, “Honesty, Morality and the Cartel Offence” (2007) 28 ECLR 353; J Warin, D Burns & J Chesley, “To Plead or Not to Plead? Reviewing a Decade of Criminal Antitrust Trials” [2006] (July) *The Antitrust Source* 1 at 4.

¹¹⁹ *A-G (Cth) v Associated Northern Collieries* (1911) 14 CLR 387 is one classic example. See also CE Parker, “The ‘Compliance Trap’: The Moral Message in Responsive Regulatory Enforcement” (2006) 40 *Law & Society Review* 591 at 607 (moral ambiguity on part of managing director of Wilson Transformer Company in the Australian heavy electrical transformer price fixing and market sharing conspiracy).

¹²⁰ The history of commerce is rich in examples of cartels approved by governments and admired by non-business as well as business constituencies; see eg MC Levenstein & SW Salant, *Cartels* (Edward Elgar, 2007) Vol 1 Part I.

- Dispensing with a requirement of dishonesty does not result in “strict liability” if the cartel offence is defined sensibly in terms of fault elements.¹²¹ Intention is required for the offences of collusive market subversion suggested in Part 3 above.
- Dishonesty is a misleading and unnecessary way of trying to label a cartel offence in denunciatory terms; see Part 8 below.

5.3 The ambiguity of the wording “purpose of a cartel provision”

The concept of the purpose of a cartel provision in s 44ZZRD(2) is likely to cause much the same difficulty of interpretation and application as that now occasioned by the use of the wording “purpose of a provision” in s 45 and s 4D.

The concept of purpose of a provision was interpreted as requiring a common purpose in *Carlton & United Breweries (NSW) Pty Ltd v Bond Brewing NSW Ltd*.¹²² By contrast, in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd*¹²³ the Full Federal Court took the view that the purpose of a provision could be anti-competitive where only one of the alleged parties had a subjective anti-competitive purpose.¹²⁴ By further contrast, in *Seven Network Limited v News Limited*,¹²⁵ Sackville J adopted the interpretation that the relevant purpose must be shared by “each of the parties responsible for including” the relevant anti-competitive provision in an agreement as distinct from the parties to the alleged agreement. The interpretation adopted in *Seven Network Limited v News Limited* raises the difficulty of determining which parties are to be taken as being “responsible for including” the relevant anti-competitive provision in an agreement.

The solution called for, at least in the context of the cartel offences, is to dispense with the concept of “purpose of a provision” and to define the cartel offences in terms of an intention

¹²¹ The statement in *Norris v The Government of the United States* [2008] UKHL 16 at [4] that the offence under s 1 of the *Sherman Act* is an offence of “strict liability” is incorrect and misleading: criminal liability under s 1 requires an intent to restrain competition but, given the per se nature of liability, not an intent to restrain competition unreasonably. See American Bar Association, *Criminal Antitrust Litigation Handbook* (2nd ed, 2006), 301-303.

¹²² (1987) ATPR [40-820] at [48,880].

¹²³ (1990) 27 FCR 460.

¹²⁴ See the criticism in D Robertson, “The Primacy of Purpose in Competition Law – Pt 1” (2001) 9 CCLJ 4 at [71]-[72].

¹²⁵ [2007] FCA 1062 at [2402] ff.

on the part of all the alleged principal offenders. See the offence of collusive market subversion suggested in Part 3 above.

Reliance on the requirement of intention in the offences of collusive market subversion suggested in Part 3 is also intended to avoid the distinctions between ends and means and immediate and ultimate purposes that lurk in the wording “purpose of a provision.”¹²⁶ As Beaton-Wells has explained:¹²⁷

Intention is seen as the cornerstone of the fault elements in the criminal law, reflecting the paradigm of individual choice and control that is necessary for criminal responsibility. ... it is distinguishable from the concept of purpose under the civil prohibition; whereas ‘purpose’ in this context is viewed as the end aimed at, ‘intention’ has a much broader scope, encompassing both the end and the means by which it is to be reached, as well as knowledge of all the relevant circumstances.

5.4 The vagary of the concept of unjustified risk in the element of recklessness

The EDB cartel offences require recklessness in relation to the effect or likely effect of price fixing, reduction of output, allocation of customers or bid-rigging. Recklessness in relation to a result is defined in s 5.4(2) of the *Criminal Code* (Cth) as: (i) awareness of a substantial risk that a circumstance exists or that a result will occur; and (ii) the unjustifiable taking of that risk on the facts known to the accused. Under s 5.4(3) of the *Criminal Code*, the question whether the taking of a risk is unjustifiable is one of fact.

The unjustifiable risk element in recklessness under s 5.4(2) of the *Criminal Code* requires the jury to make a moral or value judgment about the conduct in issue.¹²⁸ This opens the

¹²⁶ See *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563; *Rural Press Ltd v ACCC* (2003) 216 CLR 53, as criticised in I Wylie, “What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond” (2007) 35 ABLR 33, especially at 42:

... how easy is it to apply the test enunciated by the High Court? One might have thought, for example, that the High Court’s test in *Souths* focusing on the *end* the parties had *in view*, and requiring at least that the provision be *directed towards* a particular class, would not have been satisfied on the facts in *Rural Press HC*. That was certainly the view of the unanimous Full Federal Court in that case. Of course the High Court’s new test was not satisfied (by majority) in the High Court in *Souths*, although the Full Federal Court had (by majority) found to the contrary that the “fourteen team term” did contravene in that case. The *Rural Press FC* test requiring targeted conduct for contravention was at least clear in its application.

¹²⁷ “Capturing the Criminality of Hard-Core Cartels: The Australian Proposal” (2007) 31 *Melbourne University Law Review* 675 at 686.

¹²⁸ *R v Saensai-Or* (2004) 61 NSWLR 135 at [70]; S Odgers, *Principles of Federal Criminal Law* (Lawbook Co, 2007) 46-47.

way for defendants charged with the EDB cartel offences to deny liability on the basis that their conduct was socially or morally justifiable because, for example, the price fixed was a “reasonable price” or that market sharing was needed to save jobs during an economic downturn.¹²⁹ The resulting uncertainty and difficulty of application are similar to the uncertainty and difficulty of applying the concept of dishonesty, as discussed in Part 5.2 above.

Recklessness is best avoided as a fault element of the cartel offences. A better approach is to require intention. See the offence of collusive market subversion suggested in Part 3 above.

5.5 The differing possible interpretations of “fixing, controlling or maintaining” a price

The EDB does not resolve the uncertainty that now exists as to the degree of control required to “control” a price in the context of price fixing. In *ACCC v CC (NSW) Pty Ltd*¹³⁰ Lindgren J held that degrees of control are relevant to penalty but not to liability for price-fixing as defined by section 45A of the TPA. However, in *ACCC v The Australian Medical Association Western Australia Branch Inc*¹³¹ Carr J disagreed with that interpretation.

This conflict is easily resolved. The suggestion made in Part 3.2 above, in the context of the offence of collusive market subversion suggested in Part 2.6, is that an intention to control or maintain a price be defined to require an intention that the alleged cartel provision will exert a major contributing influence on the relevant price.

Nor does the EDB clarify the nebulous concept of “incidental effect” that continues to hang over the concept of “fixing, controlling or maintaining” a price. In *Re: Radio 2UE Sydney and Stereo FM Pty Limited and 2 Day-FM Limited*¹³² Lockhart J stated that a provision is not a price-fixing provision if it has only an “incidental effect” on price. “Incidental effect” has various possible meanings, including these:

- (1) an unlikely effect;
- (2) a likely effect that is secondary but nonetheless sufficient to have the effect of “controlling” or “maintaining” a price;

¹²⁹ See Part 5.2 above.

¹³⁰ [1999] FCA 954 at [178].

¹³¹ [2003] FCA 686 at [195].

¹³² (1982) 62 FLR 437 at 448.

- (3) a likely effect that is not appreciable and hence insufficient to have the effect of “controlling” or “maintaining” a price;
- (4) an effect that is unintended but likely to “control” or “maintain” a price; and
- (5) an effect that is unintended and unlikely to “control” or “maintain” a price.

Clarification would be desirable in the context of the cartel offences and per se civil penalty provisions. An “incidental effect” in the sense of meanings (1), (3), or (5) above should exclude liability for price fixing. However, an “incidental effect” in the sense of meanings (2) or (4) above should not exclude liability for price fixing.

5.6 The uncertainty of the concept of an “allocation” of customers

Section 44ZZRD(2)(c) does not define what is meant by an “allocation” of customers or geographical areas.¹³³ As a result it is unclear how formal, explicit or structured the allocation has to be. For example, competitors A and B may agree not to contest the opportunity to take business away from each other’s existing customers. Have they “allocated” the customers? Or does this conduct amount to retention or maintenance of customers rather than allocation of them?

The EDB provisions on allocation of customers are unnecessary. The alternative approach discussed in Part 2.2.4 above is to avoid introducing new concepts such as the allocation of customers by taking the existing per se civil penalty prohibitions as the starting point. That approach is illustrated by the offences of collusive market subversion suggested in Part 3.

5.7 The questionable workability of the EDB cartel offences in jury trials

The fault elements and physical elements of the EDB cartel offences are complex and would create some difficulty for trial judges when directing juries and for juries when considering their verdict.¹³⁴

It may be possible to arrive at comprehensible jury directions on the physical elements of a cartel offence under the EDB, at least where the indictment focuses on one type of cartel

¹³³ See Issues Paper, Part 5.3.1 D.

¹³⁴ Compare American Bar Association, *Model Jury Instructions in Civil Antitrust Cases* (2005).

conduct (eg price fixing, and does not contain multiple counts based on all the different forms of cartel conduct proscribed by s 44ZZRD(2). Model jury instructions would assist.¹³⁵

However, the fault elements of the EDB cartel offences present more of a challenge. There are five main fault elements:¹³⁶

- (1) the fault element in relation to: (a) the making of a contract or arrangement or the arriving at an understanding; and (b) the giving effect to a cartel provision;
- (2) the fault element in relation to the purpose/effect condition of the cartel provision;
- (3) the fault element in relation to the competition condition of the cartel provision;
- (4) the fault element of intention to obtain a benefit in the requirement that the accused must act with an “intention dishonestly to obtain a benefit”; and
- (5) the fault element of knowledge in the requirement for dishonesty that the accused must know that the relevant conduct is dishonest according to the standards of ordinary people.¹³⁷

All of these fault elements must be proven against an accused in order to establish liability. Given the multiple and rather technical nature of these fault elements, it would be understandable if juries were to seek refuge in their own ideas about the type of fault required.¹³⁸

The fault elements of the offences of collusive market subversion and giving effect to collusive market subversion (see Part 3 above) are relatively straight forward. They focus on

¹³⁵ See generally, S Wilson, "'Collaring' the Crime and the Criminal?: 'Jury Psychology' and Some Criminological Perspectives on Fraud and the Criminal Law" (2006) J Crim L 75.

¹³⁶ It is possible that some of the physical elements could be treated as one or more composite elements (compare *R v Saengsai-Or* (2004) 61 NSWLR 135; *R v Cao* (2006) 65 NSWLR 552); if so, the fault elements could be specified in less complex terms but query to what legitimate extent.

¹³⁷ See further S Odgers, *Principles of Federal Criminal Law* (Lawbook Co., 2007) at 33-36.

¹³⁸ For an interesting empirical study of jury decision-making in civil actions against corporations in the USA, see V Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* (Yale University Press, 2000).

a requirement of intention and, unlike the EDB cartel offences, avoid the convolution of requiring intention in relation to some physical elements, recklessness in relation to others, and knowledge in relation to the requirement of dishonesty.

This risk of jury confusion can also be minimised by explicitly stating all the fault elements in the definition of the cartel offences instead of hiding fault elements that depend on the application of the general fault provisions in the *Criminal Code* (Cth).¹³⁹ The definition of the offences suggested in Part 3 above specifies all the fault elements that must be present for liability.

¹³⁹ Consistently with the approach recommended in Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, Report No 95 (2002), [11.54], p 405, <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/> viewed 14 February 2008.

6. VICARIOUS CRIMINAL RESPONSIBILITY

6.1 Personal and vicarious criminal responsibility – general principle

It is a general principle of criminal law that a defendant is responsible for an offence only if he or she personally performed the conduct proscribed and did so with the requisite fault element.¹⁴⁰ Under that principle, it is insufficient for the prosecution to prove that the conduct element or the fault element was present on the part of an employee or agent acting on behalf of the defendant.

Imposing vicarious responsibility in relation to the conduct proscribed is relatively uncontroversial if personal fault is required. However, the same is not true if vicarious responsibility is also imposed in relation to the fault elements of an offence.

6.2 Vicarious individual criminal responsibility for the EDB cartel offences

Sections 84(3) and (4) of the EDB impose vicarious individual criminal responsibility but jail is excluded by s 84(4A) where vicarious responsibility is relied upon.

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

- (3) If, in:
- (a) a prosecution for an offence against s 44ZZRF or s 44ZZRG in respect of conduct engaged in by a person other than a body corporate; or
 - (b) ... ;
- it is necessary to establish the state of mind of the person, it is sufficient to show that:
- (c) an employee or agent of the person engaged in that conduct; and

¹⁴⁰ G Williams, *Criminal Law: The General Part* (2nd ed, Stevens & Sons, 1961) ch 7; LH Leigh, *Strict and Vicarious Liability* (Sweet & Maxwell, 1982) ch 2.

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

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

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

- (4A) If:
 - (a) a person other than a body corporate is convicted of an offence; and
 - (b) subs (3) or (4) applied in relation to the conviction on the basis that the person was the person first mentioned in that subsection; and
 - (c) the person would not have been convicted of the offence if that subsection had not been enacted;
- the person is not liable to be punished by imprisonment for that offence.

The approach taken under the EDB is consistent with the imposition of vicarious criminal responsibility on individual persons in relation to offences relating to unfair practices under Part VC of the *Trade Practices Act* 1974. Nonetheless, vicarious criminal responsibility is inconsistent with the general principle at common law.¹⁴¹ The approach taken under the EDB and the existing ss 83(3)-(4) clashes with the view expressed in the recent report of the Corporations and Markets Advisory Committee that corporate officers should not be subject to criminal liability on a strict or automatic basis and that liability should require participation and fault as an accessory under the general principles of criminal responsibility for complicity.¹⁴²

¹⁴¹ Williams G, *Criminal Law: The General Part* (2nd ed, Stevens & Sons, 1961) ch 7.

¹⁴² Corporations and Markets Advisory Committee, *Report on Personal Liability for Corporate Fault* (September 2006) 33-36, available at <http://www.camac.gov.au/CAMAC/camac.nsf/byHeadline/Whats+NewPersonal+Liability+for+corporate+fault+Report?openDocument> viewed 13 February 2008.

The EDB provisions in question thus represent an unprincipled attempt to exploit the functional advantages of the criminal law (especially the capacity to convey a stronger deterrent threat) without fully recognising and applying the traditional general principle that criminal responsibility requires personal fault.

A more principled approach is at the least to provide a defence where an accused can show that he or she took reasonable precautions to prevent an employee or agent from engaging in conduct that constitutes the physical elements of an offence.¹⁴³

6.3 Vicarious corporate criminal responsibility for the EDB cartel offences

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

- (1) If, in:
 - (a) a prosecution for an offence against s 44ZZRF or 44ZZRG in respect of conduct engaged in by a body corporate; or
 - (b) ... ;it is necessary to establish the state of mind of the body corporate, it is sufficient to show that:
 - (c) a director, employee or agent of the body corporate engaged in that conduct; and
 - (d) the director, employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and
 - (e) the director, employee or agent had that state of mind.

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

The *Criminal Code* (Cth) provisions on corporate criminal responsibility under Part 2.5 of the Code do not apply: EDB s 6AA(2). The approach taken is consistent with the imposition of

¹⁴³ See eg TPA s 44ZZO(4).

vicarious criminal responsibility on corporations in relation to offences relating to unfair practices under Part VC of the TPA (see also *Australian Securities and Investment Commission Act 2001* (Cth) s 12GH) and offences under Chapter 7 of the *Corporations Act 2001* (Cth) (s 769A). Nonetheless, vicarious criminal responsibility is inconsistent with the general principle at common law that criminal responsibility is personal not vicarious.¹⁴⁴ Numerous other major Commonwealth statutes apply the principles of corporate fault under Part 2.5 of the *Criminal Code* (Cth).

Few would cavil at the imposition of vicarious corporate responsibility for the conduct of employees or agents who have acted on behalf of a corporation. However, vicarious responsibility in relation to the fault elements of an offence is more objectionable. The principles of corporate fault under Part 2.5 of the *Criminal Code* (Cth) may be too difficult to establish in the context of price fixing and market division.¹⁴⁵ If so, that does not explain why the cartel offences should not be subject to a defence that the corporate defendant took reasonable precautions and exercised due diligence to avoid the conduct subject to prosecution.¹⁴⁶ Such a defence is available under s 44ZZO and s 152EO of the TPA and under standard provisions in numerous Acts of the Commonwealth of Australia.¹⁴⁷

It may be objected that a defence of reasonable corporate precautions would be too lax. To this objection there are two main responses:

- (1) The criminal law is not simply a variant of, or quick and easy substitute for, civil penalty liability. It is a distinctive and potent form of social control the distinctiveness and stigmatic potency of which depends on limited use and many long-accepted general principles and special rules, including the general principle that criminal liability requires personal fault.¹⁴⁸ If the need

¹⁴⁴ G Williams, *Criminal Law: The General Part* (2nd ed, Stevens & Sons, 1961) ch 7.

¹⁴⁵ See B Fisse, "The Cartel Offence: Dishonesty?" (2007) 35 ABLR 235 at 273-275. In my view, the Criminal Code principles of corporate criminal responsibility are unworkable and need to be revised.

¹⁴⁶ It might be argued that vicarious liability is imposed on corporations under s 1 of the *Sherman Act* (US) and that this approach should be followed. However, vicarious corporate criminal responsibility has been the general principle in the USA for a century or longer. By contrast, the general principle in Australian jurisdictions is that corporate criminal responsibility is personal not vicarious. The US general principle of vicarious corporate criminal responsibility has come under increasing criticism; see A Weissmann, "A New Approach to Corporate Criminal Liability" (2007) 44 American Criminal Law Review 1319; S Buell, "The Blaming Function of Entity Criminal Liability" (2006) 81 Ind LJ 473; A Weissmann A & D Newman D, "Rethinking Corporate Criminal Liability" (2007) 82 Ind LJ 411..

¹⁴⁷ A defence of reasonable corporate precautions is available under well over 40 Commonwealth statutes; see eg, *Banking Act 1959* (Cth) s 69C; *Financial Transactions Reports Act 1988* (Cth) s 34; *Privacy Act 1988* (Cth) s 99A; *Life Insurance Act 1995* (Cth) s 250; *Petroleum Excise (Prices) Act 1987* (Cth) s 11; *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (Cth) s 15.

¹⁴⁸ See A Ashworth, *Principles of Criminal Law* (5th ed 2006) chs 2-3.

to impose vicarious responsibility is compelling, the least drastic and appropriate solution is to rely on civil penalty liability.¹⁴⁹

- (2) The courts have been increasingly critical of attempts to mitigate penalty in civil penalty proceedings on the basis that the corporation had a compliance program. There are numerous examples where compliance programs have been examined sceptically and where it is unlikely in the extreme that the defendant could show that reasonable precautions had been taken.¹⁵⁰

¹⁴⁹ See Australia, Minister for Justice and Customs, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (February 2004) 58.

¹⁵⁰ See especially *ACCC v Australian Safeway Stores Pty Ltd (No 4)* (2006) ATPR 41-101 at [62]-[67]; *ACCC v George Weston Foods Ltd* (2000) ATPR 41-763 at [48]; *ACCC v Leahy Petroleum Pty Ltd (No 2)* (2005) ATPR 42-051 at [12], [51]; *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No. 3)* [2007] FCA 1617 at [319]. See also *ASIC v Chemeq Limited* [2006] FCA 936.

7. AVENUES FOR UNMERITORIOUS DENIALS OF LIABILITY

7.1 The threat of untoward corporate responses to cartel offences

The need for offences to be defined in terms resistant to evasion and manipulation is a basic pre-condition of deterrence. This desideratum is particularly important in the context of cartel offences given the well-known capacity of corporations to resist or “game” legislative attempts to interfere with their autonomy.¹⁵¹

The EDB cartel offences would create significant avenues for unmeritorious denials of liability.

7.2 Implications of the subjective element of the test for dishonesty

The requirement for dishonesty of “knowledge that the conduct was dishonest according to the standards of ordinary people” is a subjective test that will allow large and sophisticated corporations to deny liability and quite possibly obtain an acquittal on the basis of subjective beliefs about the morality of their conduct.¹⁵² One of many possibilities is that accused will argue that the price fixed with a competitor was a “reasonable price” and hence that the conduct was not known to be dishonest according to the standards of ordinary persons.¹⁵³ A “reasonable price” argument is legally irrelevant under the definition of price fixing in s 45A(1) of the *Trade Practices Act* and under s 1 of the *Sherman Act*. However, such an argument is legally relevant to the issue of dishonesty under the definition of the EDB cartel offences and that issue is for the jury, not the judge, to decide.¹⁵⁴

¹⁵¹ A perennial theme in the literature on corporate crime and corporate regulation; see eg M Punch, *Dirty Business: Exploring Corporate Misconduct* (Sage, 1996) (view that business is criminogenic); 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). No one should underestimate the skills, ingenuity or perseverance of white-collar defence lawyers: see K Mann K, *Defending White-Collar Crime* (Yale University Press, 1985). Consider also the thesis in A Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Belknap Press, 1993).

¹⁵² The EDB cartel offences neglect history: consider the laxity of the cartel prohibitions in the *Australian Industries Preservation Act 1906* (Cth) as interpreted by the High Court and Privy Council in *A-G (Cth) v Associated Northern Collieries* (1911) 14 CLR 387; (1913) 18 CLR 30 (the *Coal Vend case*); see further G Walker, *Australian Monopoly Law* (Cheshire, 1967) 31-34.

¹⁵³ Under the EDB, the requirement of dishonesty relates to the obtaining of a benefit; deception is insufficient.

¹⁵⁴ On the limited power of a judge to direct a jury to convict and the unsatisfactory views expressed in *Yager v The Queen* (1977) 139 CLR 28, see P Gillies & A Dahdal, “Directions to Convict” (2007) 31 Criminal LJ 295.

Justice Heerey¹⁵⁵ has drawn attention to the jury direction that was upheld by the Court of Appeals for the Ninth Circuit in *United States v Alston*.¹⁵⁶

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

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

“The direction in *Alston* gives us a useful glimpse into the kind of issues that would inevitably arise in criminal trials for price fixing were a dishonesty element to be introduced. It is hard to argue with the proposition that a person is not dishonestly obtaining a gain if he or she thinks a price (albeit a fixed one) is reasonable and fair. Certainly one would expect defence counsel to put such a proposition to juries. What is a jury to take as reasonable or unreasonable or fair or unfair? Presumably the jury would have to be satisfied beyond reasonable doubt that the defendant did not actually believe that the prices were reasonable or fair *and* knew that “ordinary people” would not believe them to be reasonable or fair.”¹⁵⁷

The subjective limb of the test of dishonesty would also open the way for accused to rely on mistake of law as a way of denying that their conduct was dishonest. Such laxity is highly contentious. If, as a matter of policy, it is thought desirable to allow a defence of ignorance or mistake of law, or reliance on official advice or an expert economist’s opinion, a fundamental issue of policy is whether any such defence should be limited to the new cartel offences

¹⁵⁵ Justice Heerey, “Commentary on Paper of Brent Fisse and Caron Beaton-Wells”, seminar “Criminalising Cartel Conduct: Issues of Law and Policy”, University of Melbourne, 25 February 2008 (copy on file with author).

¹⁵⁶ 974 F 2d 1206 (1992) at 1210.

¹⁵⁷ Compare the reasonable price arguments raised and rejected in *US v Trans-Missouri Freight Association*, 166 US 290 (1897); *US v Trenton Potteries Co*, 273 US 392 (1927); *US v Socony Vacuum Oil Co*, 310 US 150 (1940). Contrast *Addyston Pipe and Steel Company v US*, 175 US 211 (1899); *Appalachian Coals, Inc v US*, 288 US 344 (1933). On the importance of the rejection of a reasonable price standard in the Trans-Missouri case, see RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1993) 22-26.

rather than being made a general defence in the criminal law.¹⁵⁸ If there are to be such defences, general or special, the defences would need to be defined in accordance with standard definitional form and practice for criminal law defences. Additionally, consideration should be given to the possibility of placing a persuasive burden of proof on the accused and limiting any new defences to a belief based on objectively reasonable grounds.

Dishonesty should not be an element of the Australian cartel offences.

7.3 Dishonesty as a back-door avenue for a lenient joint venture defence

As part of a denial that an accused acted with an intention dishonestly to obtain a benefit, defence counsel may introduce evidence of the reasons why an accused entered into a joint venture and why the use of that joint venture was believed by the accused to be permissible. This back-door opportunity to invoke a joint venture defence is lenient in two respects:

- First, denial of an intention to dishonestly obtain a benefit does not impose a persuasive burden of proof on the accused – the prosecution must prove its case beyond a reasonable doubt. By contrast, the joint venture defence under s 76C or s 76D imposes a persuasive burden on an accused to establish the defence.
- Secondly, denial of an intention to dishonestly obtain a benefit does not necessarily require the defendant to satisfy a competition test – it is sufficient for the defendant to point to a belief (eg that the joint venture would achieve some efficiencies or would probably have been authorised if an application for authorisation had been made).

The solution is not to define the cartel offences in terms of dishonesty but to leave the parties to a joint venture to make out a joint venture defence.¹⁵⁹

7.4 Unjustified risk in recklessness as a charter for denials of liability

Liability for the EDB cartel offences may be denied on the basis that, although the relevant parties to the contract, arrangement or understanding were aware of a substantial risk that the

¹⁵⁸ See A Ashworth, *Principles of Criminal Law* (5th ed, 2006) 232-237; I Leader-Elliott, "Benthamite Reflections on Codification of General Principles of Criminal Liability: Towards the Panopticon" (2006) 9 Buffalo Criminal LR 101 at 142-159.

¹⁵⁹ See Part 4.8 above.

cartel provision would result in price fixing, reduction of output, allocation of customers or bid rigging, the taking of that risk was justifiable on the facts known to them.¹⁶⁰

The element of unjustified risk may work in the context of murder, assault and other familiar serious offences because centuries of experience have mapped out community thinking about what is and what is not a justified risk.¹⁶¹ The same is not true of the EDB cartel offences.

As discussed in Part 5.4 above, the unjustified risk element in recklessness opens the way for defendants charged with the EDB cartel offences to deny liability on the basis that their conduct was socially or morally justifiable because, for example, the price fixed was a “reasonable price” or market sharing was needed to save jobs during an economic downturn. It also creates a back-door avenue for a lenient joint venture defence. The resulting laxity is similar to the laxity of the element of dishonesty as criticised in Parts 7.2 and 7.3 above.

These concerns are another reason why recklessness should not be a fault element of the cartel offences. A preferable approach is to define the offences so as to require intention. That is the approach taken for the offences of collusive market subversion suggested in Part 3 above.

¹⁶⁰ See Part 5.4 above.

¹⁶¹ See J Michael & H Wechsler, “A Rationale of the Law of Homicide” (1937) 37 Columbia LR 701 at 742-746.

8. LABELLING AND SIGNALLING

8.1 The need for accurate labelling and clear deterrent signalling

The need for accurate labelling of offences and clear deterrent signalling is as described by Ashworth:¹⁶²

[The] concern is to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking. One good reason for respecting these distinctions is proportionality: one of the basic aims of the criminal law is to ensure a proportionate response to law-breaking, thereby assisting the law's educative or declaratory function in sustaining and reinforcing social standards. This argument is sometimes grounded exclusively in popular opinion: the law must keep in close touch with the sentiments of ordinary people. However, the primary argument should be about what it is right to do, not about what it is politically prudent to do. Fairness demands that offenders be labelled and punished in proportion to their wrongdoing; the label is important both for public communication and, within the criminal justice system, for deciding on appropriate maximum penalties, for evaluating previous convictions, classification in prison, and so on.

A second justification for the principle of fair labelling does have a more direct connection with common patterns of thought in society. It is that where people generally regard two types of conduct as different, the law should try to reflect that difference. ... Perhaps the clearest example is robbery, an offence with a maximum sentence of life imprisonment which conjures up an armed raid by masked men seeking substantial money or property, and yet which in English law is fulfilled by a slight push in order to snatch a purse or handbag. The offence should be subdivided to reflect the very different degrees of force used or threatened in different robberies.

As discussed below, the EDB cartel offences suffer from an identity crisis and an insipid name.

¹⁶² A Ashworth, *Principles of Criminal Law* (5th ed, 2006) 88-89.

8.2 The identity crisis of the EDB cartel offences

Hallmark features of well-designed offences are that they define the conduct prohibited in terms that stamp the conduct with the prime reason for prohibiting the conduct and then use that label as a focal medium to signal a deterrent threat. The EDB cartel offences exhibit poor design. The label they bear and the signal they emit are garbled. They reflect an identity crisis.

The requirement of an intention dishonestly to obtain a benefit suggests that the cartel offences are offences against property. However, to label serious cartel conduct as an offence against property is misleading.

Some portray a cartel offence as a species of theft.¹⁶³ The comparison does not capture the essence of a cartel offence.¹⁶⁴ Price fixing and other forms of serious cartel conduct are concerned most fundamentally with unjustified interference with competitive market forces.¹⁶⁵ Although price fixing is often referred to by the ACCC Chairman as “theft”, this analogy is questionable¹⁶⁶ and is not one of judicial choice. Rather, in setting penalties in cartel cases, judges often encapsulate the “harm” caused by such conduct in terms that refer to the distortion of or interference with the competitive process.¹⁶⁷ The interference with market forces may, but need not necessarily, result in benefits to cartellists or losses to their victims. The essence is interference with, or subversion of, the competitive process as distinct from acquisition of property or causing a financial or other loss. An intention to obtain a benefit does not go to the heart of the subject matter because the subversion of the competitive process is the core harm and that core harm is inflicted whether or not the subversion happens to result, or be intended to result, in the obtaining of a benefit or the causing of a loss.

¹⁶³ Similarly, market manipulation and other offences might be described loosely as involving “fraud on a market”, in the sense relevant under US securities law. However, fraud on a market is very different from dishonesty in the *Ghosh* sense: it does not require that the conduct was dishonest according to the standards of ordinary people, nor that the defendant knew that the conduct was dishonest according to those standards. See further CAMAC, Discussion Paper, *Shareholder Claims Against Insolvent Companies: Implications of the Sons of Gwalia Decision* (Sept 2007) ch 9.

¹⁶⁴ Another misdescription is the label “protection against property” used in H Mannheim, *Criminal Justice and Social Reconstruction* (OUP, 1946) ch 8.

¹⁶⁵ See *ACCC v CC (NSW) Pty Ltd* [1999] FCA 954 at [182]; *US v Container Corporation of America*, 393 US 333 at 337 (1969); *US v Socony-Vacuum Oil Co Inc*, 310 US 150 at 224 fn 59 (1940); *Re Insurance Council of New Zealand (Inc)* (1989) 2 NZBLC (Com) 99-522 at 104,482.

¹⁶⁶ See E Pitt, “Markets are Instruments not Values” (2006) 27 ECLR 1, Pt 1 (personal enrichment of the individuals concerned has rarely been the real motive behind engagement in cartel behaviour).

¹⁶⁷ See eg *ACCC v McMahon Services Pty Ltd (ACN 008 274 020) (No 1)* [2004] FCA 1171 at [76]; *ACCC v Leahy Petroleum (No 2)* [2005] FCA 254 at [15]; *ACCC v Visy Holdings Pty Ltd No 3* [2007] FCA 1617 at [306].

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

Serious cartel conduct has a much closer affinity to the subject matter of offences under Commonwealth law that are concerned with interference with, or subversion of, markets and other systems essential to the effective functioning of the economy or polity:

- Consider the offences under s 1311 of the *Corporations Act 2001* (Cth) of market manipulation and market rigging (ss 1041A, 1041B and 1041C), insider trading (s 1043A), and continuous disclosure (ss 674, 675). These offences are all concerned with conduct that is likely to distort or subvert the share market.¹⁶⁸ They are serious offences (they carry a maximum jail term of 5 years). Dishonesty is not a requisite element of any of these offences: their subject matter is not breach of an obligation to act honestly in one's dealings with another's property or information or in the conduct of a public or corporate office that is subject to a fiduciary duty to act in good faith and not for one's own interests. Nor are they defined in terms of an intention to obtain a benefit or to cause a loss.¹⁶⁹

¹⁶⁸ For insider trading, see A Black, "The Reform of Insider Trading Law in Australia" (1992) 15 UNSWLJ 214. For market manipulation, see A Loke, "Common Origins, Different Destinies: Investors' Rights against Market Manipulation in the UK, Australia and Singapore" (2007) at <http://users.austlii.edu.au/clta/docs/pdf/2007-cof-papers/loke.pdf>. Note that market manipulation and market rigging may be committed collusively by competitors in a way that is similar to price fixing. Consider eg the alleged collusion between hedge funds to depress share prices by means of short selling, an allegation currently under investigation by ASIC and the ASX: "ASX probes hedge collusion", *The Australian*, 15 February 2008.

¹⁶⁹ A desperate advocate of dishonesty as an element of the new cartel offences might possibly contend that dishonesty should be an element of insider trading and other offences of market abuse. However, the argument would require a sudden and spectacular transmogrification: the offences in question are long-standing and there is no apparent move to transform them into offences requiring dishonesty. For example, no such suggestion is mentioned in the extensive re-consideration of insider trading in Corporations and Markets Advisory Committee, *Insider Trading Report* (2003). Moreover, given the

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

If collusive interference with market forces is the prime subject matter of a cartel offence then the offence should be defined in terms that unambiguously project that prime subject matter. The offences of collusive market subversion suggested in Part 3 above are so defined.

8.3 Naming the offences

“Collusive market subversion” and “giving effect to collusive market subversion” are the proposed names of the offences under subsection (1). By contrast, “cartel offence” is a bland description that masks rather than signals the nature or seriousness of the offence.

The title “cartel offence” is prosaic and robotic. “Collusive market subversion” has a more denunciatory impact and is the name used for the offences suggested in Part 3 above.

notorious difficulty of proving liability for such offences currently, adding a requirement of dishonesty would make the offences a complete dead letter.

9. CONCLUSION – A RECONSTRUCTION PLAN

The EDB is to Australian competition law what Hurricane Katrina was to New Orleans. The challenge ahead is to pump out the floodwaters and rebuild the levees.

One possible reconstruction plan:

- (1) Remove the element of intention dishonestly to obtain a benefit. It is incapable of limiting liability to serious cartel conduct, is uncertain and gives inadequate guidance to juries, opens up too many opportunities for unmeritorious defences, and creates the misleading impression that a cartel offence is some kind of offence against property, which it is not. See Parts 2.2.2, 4.1, 5.2, 7.2, 7.3, 8.2.
- (2) Abandon the new EDB concepts of price fixing, reduction of output, allocation of customers and bid-rigging – they add nothing except uncertainty and complexity; see Part 2.2.4. The Australian cartel offences should take the existing per se civil prohibitions against price fixing and exclusionary provisions as the starting point and refine those prohibitions in accordance with traditional desiderata for the definition of offences. This approach is illustrated by the offences of collusive market subversion and giving effect to collusive market subversion suggested in Part 3.
- (3) Define price fixing more narrowly and more clearly than under s 45A(1):
 - (a) require the alleged principal offenders to be competitors at all levels of the supply, production or distribution chain to which the contract, arrangement or understanding and the cartel provision relate;
 - (b) require an intention that the alleged cartel provision will exert a major contributing influence on the relevant price;
 - (c) clarify which kinds of “incidental effect” do not amount to price fixing;
 - (d) define “price” to exclude a maximum price.

See Parts 4.2 and 5.5.

- (4) Define an exclusionary provision more narrowly than under s 4D by recasting the definition in terms of the underlying economic rationale. See Parts 3 and 4.3.
- (5) Require that all of the parties alleged to have entered into a criminal cartel be competitors or likely competitors. See Parts 3 and 4.5.
- (6) Exclude supply and other vertical arrangements from the application of the cartel offences. See Part 4.6.
- (7) Replace the concept of “purpose of a provision” with a fault element defined in terms of intention. See Parts 3, 4.7, 5.3.
- (8) Define the fault element of the cartel offences in terms of intention, not recklessness. See Parts 3, 4.7, 4.10, 5.4, 5.7, 7.4.
- (9) State all the fault elements in the definition of the cartel offences explicitly instead of hiding fault elements that depend on the application of the general fault provisions in the *Criminal Code* (Cth). See Parts 3, 5.7.
- (10) Provide a defence of legitimate primary intention if the person charged is able to establish that the cartel provision is intended primarily:
 - (a) to increase the output of goods or services, to reduce their cost, to improve their quality or to achieve the use of environmentally sustainable resources;
 - (b) to prevent danger to human life or safety or to remedy harm occasioned to human persons; or
 - (c) to prevent danger to the environment or to remedy harm occasioned to the environment.

See Part 3.

- (11) Provide defences of individual reasonable precautions and corporate reasonable precautions. See Parts 6.2, 6.3.
- (12) Provide a joint venture defence similar to that under ss 76C and 76D but redefined to remove the obscurities from which those defences suffer. See Parts 4.8, 7.3.
- (13) Extend the exemptions under s 45A(4) to the cartel offences, in the context of exclusionary provisions as well as that of price fixing. See Part 4.9.
- (14) Exclude liability for conspiracy. See Part 4.11.
- (15) Use a more meaningful and denunciatory name than “cartel offence”. “Collusive market subversion” and “giving effect to collusive market subversion” are among the candidates. See Parts 3, 8.3.

Is there a simpler way?