

**THE JOINT VENTURE DEFENCES UNDER SECTIONS 76C AND 76D
OF THE AUSTRALIAN TRADE PRACTICES ACT
A COMMENDABLE MODEL FOR THE REFORM OF SECTION 30 OF THE COMMERCE ACT?**

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1. INTRODUCTION – PAST OVERKILL, CURRENT RELIEF, FUTURE PAIN?

Joint ventures and other collaborative arrangements proliferate in commerce and are often pro-competitive. However, the civil penalty prohibitions against price fixing and exclusionary provisions under s 45 of the *Trade Practices Act 1974* (Cth) (TPA) are broadly defined and, as is notorious, may apply to commercial restrictions in a joint venture arrangement even where the arrangement is pro-competitive or not significantly anti-competitive. Fortunately, the per se civil penalty prohibitions are now subject to the joint venture defences under s 76C (exclusionary provisions) and s 76D (price fixing).

Under s 76C and s 76D respectively, it is a defence to establish that the exclusionary provision or the price fixing provision in issue:

- (a) is for the purposes of a joint venture; and
- (b) does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition in any market.

Sections 76C and 76D of the TPA were enacted in 2006 and apply to proceedings instituted after 1 January 2007 whether or not the relevant contract, arrangement or understanding was entered into before or after that commencement date.

Section 76C is of little interest in New Zealand given that, since 2001, the prohibition against exclusionary provisions under s 29 of the *Commerce Act* has been subject to the defence under s 29(1A) of showing that the purpose and likely effect of an exclusionary provision is not to substantially lessen competition in a market. The s 29(1A) defence is not limited to joint ventures and hence avoids the need to work out whether or not a joint venture arrangement is genuine or sham. There is no apparent reason, other than bureaucratic inertia, why a similar defence should not have been introduced in Australia long ago.²

However, s 76D is relevant to possible amendments to s 30 of the *Commerce Act*.³ The joint venture exemptions under s 31 are very limited in scope and have been widely criticised as

² For a criticism of the approach to exclusionary provisions in Australia see Pengilley, *Price-fixing and Exclusionary Provisions* (2001) 105-106; Pengilley, “Thirty Years of the Trade Practices Act: Some Thematic Conclusions” (2004) 12 CCLJ 6 at 4.6.

³ As envisaged in eg Lear, “Joint Ventures: Treatment under New Zealand, United States and European Competition Law” (2005) 11 NZBLQ 187 at 12.1.

exposing many desirable joint venture arrangements to the operation of the per se prohibition against price fixing under s 30. Is the s 76D joint venture defence to price fixing a commendable model for reform in New Zealand?

The purpose of this paper is to consider:

- (1) how the joint venture defences under ss 76C and 76D have liberated corporations and their advisers in Australia from much of the heavy-handed impact of the per se civil penalty prohibitions under the TPA – see Part 2;
- (2) what the key elements of the joint venture defences under ss 76C and 76D are and how they apply; and
- (3) whether or not the joint venture defence under s 76D of the TPA is a commendable model for amending s 30 of the *Commerce Act* 1986 (NZ) - see Part 4.

The conclusion (Part 5 – Future Pain?) criticises two controversial features of the provisions relating to joint ventures in the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (**Exposure Draft Bill**) released by the Australian Treasury on 11 January 2008 for public consultation.

2. THE LIBERATING EFFECTS OF SECTIONS 76C AND 76D IN AUSTRALIA

2.1 Avenues for escaping the application of the per se civil penalty prohibitions to provisions in joint venture agreements

The avenues available for escaping the application of the per se civil penalty prohibitions to provisions in joint venture agreements as at 30 December 2006 were:

- (1) non-applicability of the prohibition against price fixing on the basis that:
 - (a) the parties to the contract, arrangement or understanding were not “in competition with other” within the meaning of s 45A(1) in relation to the good or services subject to the alleged price fixing;

- (b) the parties were offering a joint product and, as in the *Radio 2UE case*,⁴ were not fixing, controlling or maintaining a price within the meaning of s 45A(1);
 - (c) the alleged price fixing provision did not in fact affect price and therefore did not fix, maintain or control a price (as in *ACCC v Pauls Ltd*⁵);
 - (d) the joint venture exemption under s 45A(2) applied;
 - (e) the exemption under s 45A(4) for collective acquisition or joint advertising applied;
- (2) non-applicability of the prohibition against exclusionary provisions on the basis that:
- (a) the parties to the contract, arrangement or understanding were not “competitive with each other” within the meaning of s 4D(1)(a); or
 - (b) the “purpose” of the relevant provision was not to restrict the acquisition or supply of goods or services for or from a particular class of persons within the meaning of s 4D(1)(b);
- (3) reliance on the related corporations exemption in s 45(8) of the TPA;
- (4) reliance on the exclusive dealing exemption under s 45(6)(a) of the TPA;
- (5) reliance on the acquisition of assets exemption under s 45(7) of the TPA;
- (6) reliance on the intellectual property exemption under s 51(3) of the TPA;
- (7) reliance on the export exemption under s 51(2)(g) of the TPA; or
- (8) reliance on the process for authorisation by the ACCC.

⁴ (1983) 68 FLR 70. See also *Broadcast Music Inc v Columbia Broadcasting Service*, 441 US 1 (1979).

⁵ [2002] FCA 1586.

These possible escape routes remain open today except that the joint venture exemption under s 45A(2) (which applied to price fixing but not to exclusionary provisions) was repealed by the amendments to the TPA in 2006.

More significantly, the 2006 amendments introduced new joint venture defences for price fixing and exclusionary provisions (ss 76D and 76C respectively).

2.2 The joint venture defences under ss 76C and 76D are wider in scope than the former s 45A(2) joint venture exemption or the current s 45A(4) exemptions for collective acquisition and joint advertising

The joint venture defences under ss 76C and 76D are much wider in scope than the former exemption of joint ventures from the prohibition against price fixing under s 45A(2) of the TPA:

- in the case of unincorporated joint ventures, there need not be a joint supply, or a supply by all the parties in proportion to their respective interests in the joint venture (contrast the former s 45A(2)(a)(b));
- in the case of incorporated joint ventures, the provision need not necessarily relate to: (a) goods supplied by the body corporate and produced by it; or (b) services other than services supplied on behalf of the body corporate by a shareholder or related corporation (contrast the former s 45A(2)(c)).

The old s 45A(2) exemptions reflected mining joint ventures and failed to take account of many other kinds of joint venture arrangements that are widespread in commerce today.⁶

The joint venture defences under ss 76C and 76D are not subject to the same limitations as the collective acquisition and joint advertising exemptions under s 45A(4):

- non-collective as well as collective acquisition of goods or services is within the scope of the defences and the acquisition of goods need not result in collective title to those goods (contrast s 45A(1)(a));

⁶ On the limitations and quirks of the old s 45A(2) exemptions, see further Tonking, "Competition at Risk? New Forms of Business Cooperation" (2002) CCLJ LEXIS 17; and, in relation to the comparable exemptions that still apply under s 31 of the *Commerce Act* 1986 (NZ), see Lear, "Joint Ventures: Treatment under New Zealand, United States and European Competition Law" (2005) 11 NZBLQ 187 at 4.3.

- separate as well as joint advertising is within the scope of the defences and the advertising need not necessarily relate to the re-supply of goods or services (contrast s 45A(1)(b)).

2.3 The joint venture defences under ss 76C and 76D are broader in scope than the escape routes under s 45 and s 51

The joint venture defences under ss 76C and 76D are broader than the escape routes available under s 45 in these main respects:

- the defences are available where the parties to a joint venture are in competition with each other or competitive with each other (contrast s 45A(1); s 4D(1(a));
- the s 76D defence is available where there is no joint supply of goods or services by the parties and where it is therefore not possible to deny that a price has been fixed, controlled or maintained on the basis of the decision of the Full Federal Court in the *Radio 2UE case*;⁷
- the s 76D defence applies where a provision does have the effect of fixing, controlling or maintaining a price (contrast the position in *ACCC v Pauls Ltd*⁸);
- the defences avoid the need to rely on contestable arguments that the purpose of the alleged exclusionary provision is not to restrict the supply or acquisition of goods or services;⁹
- the defences are available whether or not the alleged price fixing or exclusionary provision relates to exclusive dealing as required for the s 45(6)(a) exemption;

⁷ (1983) 68 FLR 70.

⁸ [2002] FCA 1586.

⁹ The scope of s 4D remains uncertain notwithstanding the decisions and views expressed in *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 and *Rural Press Ltd v ACCC* (2003) 216 CLR 53. For a discussion of the resulting murk see Wylie, "What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond" (2007) 35 ABLR 33, especially at 42.

- the defences are available whether or not the alleged price fixing or exclusionary provision relates to the acquisition of shares or assets as required for the s 45(7) exemption;
- the defences avoid the need to rely on the intellectual property exemption under s 51(3), which exemption is ill-defined and uncertain in scope;¹⁰ and
- the defences avoid the need to rely on the export exemption under s 51(2)(g), which exemption is limited in scope.

2.4 Advantages of the joint venture defences under ss 76C and 76D over applications for authorisation

The joint venture defences under ss 76C and 76D have several significant advantages over the possibility of applying for authorisation by the ACCC. Reliance on the joint venture defences avoids:

- the cost and delay of the authorisation process;
- subjection to publication of sensitive commercial information on the ACCC's website;
- the need to show that the public benefits outweigh any anti-competitive or other detriments;
- conditions of authorisation that may be intrusive, impractical and unnecessary (the limitations on the ACCC's discretion to impose conditions set out by the Australian Competition Tribunal in *Application by Medicines Australia Inc*¹¹ may be more theoretical than real given the cost, delay and uncertainty of appealing to the Australian Competition Tribunal against a questionable condition); and
- limited period of an authorisation (eg 3 years).

The main relative disadvantages of the joint venture defences under ss 76C and 76D are:

¹⁰ See Eagles & Longdin, "Competition in Information and Computer Technology Markets: Intellectual Property Licensing and s 51(3) of the Trade Practices Act" (2003) 3 QUTLJ 31.

¹¹ [2007] ACompT 4 at [133]-[134].

- they offer less certainty, partly because the meaning of the wording “for the purpose of a joint venture” is uncertain, but mainly because the “substantial lessening of competition” test is fuzzy and limited guidance is available from the case law; and
- the defences will not be of any use where a joint venture is likely to achieve significant efficiencies but is nonetheless likely to substantially lessen competition in a market – authorisation will be necessary in such a case unless the parties can rely on an escape route under s 45 or s 51 (see Part 2.3 above).

The collective bargaining notification procedure under Part VII, Division 2, Subdivision B of the TPA may sometimes be relevant in the context of joint ventures. This procedure is more streamlined than that for authorisations but is also subject to cost, delay, a public benefit test, public scrutiny and a monetary ceiling.

2.5 Removal of the need to attempt to rewrite the TPA by reading in an “improving competition” test or the US antitrust doctrine of ancillary restraints

An “improving competition” test was suggested by Lockhart J in the *Radio 2UE case*¹² as a way of excluding pro-competitive conduct from the operation of the per se prohibition against price fixing:

“Nor in my view was s 45A introduced by Parliament to make arrangements unlawful which affect price by improving competition. It is fundamental to both ss 45A and 45 that the relevant conduct, in purpose or effect, substantially lessens competition or would be likely to do so. If competition is improved by an arrangement I cannot perceive how it could be characterized as a price-fixing arrangement within the ambit of those sections. This case is an example in my view of such an arrangement. Later cases will doubtless provide other examples. If competitors make an arrangement to establish a better market by, for example, forming an organization through which they operate by exchanging information in ways that make prices more competitive, I do not see how such an arrangement is, per se, prohibited by s 45A.”

Understandably, some legal advisers have sought to rely on Lockhart J’s dictum in an attempt to get around the strict application of the per se prohibitions to joint venture arrangements.

¹² (1982) 62 FLR 437 at 448.

Such reliance is a placebo than rather than a cure. In my view, the “improving competition” test is unlikely to be followed, mainly for these reasons:

- The view expressed by Lockhart J was obiter and the Full Federal Court studiously avoided endorsing it.¹³
- The test whether or not a provision “improves competition” is ill-defined and conducive to uncertainty, inconsistency and decisions highly prone to appeal. Lockhart J’s dictum appears to have been influenced by the doctrine of ancillary restraints and the rule of reason under US antitrust law but the “improves competition” test is not the same as that doctrine or that rule. It is unclear, for example, whether Lockhart J envisaged that a “quick look” process¹⁴ would be used to apply the “improves competition” test. Unless authorised by statute, the use of a quick look process would be likely to spawn appeals by aggrieved parties on the ground of lack of due process. If a quick look process is not used, the effect would be to introduce a variation of the substantial lessening of competition test and thereby undermine the legislative purpose of using a per se prohibition as a means of avoiding the need for any inquiry into competition effects.
- The dictum is incoherent because, on the rationale stated by Lockhart J, competitively neutral conduct or mildly anti-competitive conduct should be excluded as well as conduct that improves competition.
- Purposive interpretation does not license the courts to read a qualification or limitation into a provision if the qualification or limitation would obviously cause significant difficulties of interpretation and application. The qualification or limitation that the per se civil penalty prohibitions do not apply unless a provision “improves competition” is ill-defined and, if read into s 45A(1) or s 4D of the TPA, or s 30 of the *Commerce Act*, would be likely to cause significant difficulties of interpretation and application.
- The extent of judicial support for Lockhart J’s dictum is very limited and should not be overstated. One author has said that: “a number of Federal Court decisions have favourably cited Lockhart J’s comments on

¹³ (1983) 68 FLR 70.

¹⁴ See *California Dental Association v FTC*, 526 US 756 (1999).

characterisation”,¹⁵ with reference to: *Australian Competition & Consumer Commission v Pauls Ltd*;¹⁶ *Australian Competition & Consumer Commission v Leahy Petroleum*;¹⁷ and *Australian Competition & Consumer Commission v CC (NSW) Pty Ltd*.¹⁸ However, in none of these cases was the possible improvement of competition a relevant issue, and there was no endorsement of the proposition that a provision that “improves competition” is not price-fixing. In *ACCC v Pauls Ltd*, O’Loughlin J agreed with Lockhart J that care was needed in characterising conduct as price-fixing under s 45A but did not say that conduct is not to be characterised as price-fixing unless it “improves competition”.¹⁹ Similarly, in *ACCC v Leahy Petroleum* Merkel J avoided mention let alone endorsement of Lockhart’s dictum that s 45A does not apply unless a provision “improves competition”.²⁰ In *ACCC v CC (NSW) Pty Ltd*, Lindgren J did refer to Lockhart J’s dictum but did not express any view on whether the dictum was sound or unsound;²¹ there is no basis for saying that he “favourably cited” the dictum.

Understandably again, some legal advisers and commentators have contended that s 45A and s 4D of the TPA and s 30 of the *Commerce Act* should be read down by applying the doctrine of ancillary restraints that has been developed by US courts in the context of section 1 of the *Sherman Act*. However, in my view, that approach is unlikely to be followed by the courts in Australia or New Zealand:

- Section 45A(1) and s 4D of the TPA seek to define price-fixing and exclusionary provisions in a more prescriptive way than s 1 of the *Sherman Act*. The same is true of s 30 of the *Commerce Act*. The legislative intention was partly to avoid the imprecision and uncertainty of the distinction between per se and rule of reason cases under s 1 of the *Sherman Act*. That distinction requires the use of the convoluted and impressionistic process of analysis (for an instructive example, see *Craftsmen Limousine v Ford Motor Co*²²).

¹⁵ Scott, “Unresolved Issues in Price Fixing: Market Division, The Meaning of Control and Characterisation” (2006) 12 Canterbury LR 197 at 230. I also disagree with the earlier assessment of the status of Lockhart J’s dictum made in Stevens & Dean, “Horizontal Price-fixing and Competition Collusion: In Search of Workable Boundaries” in Ahdar (ed), *Competition Law and Policy in New Zealand* (1991) 155 at 176.

¹⁶ (2003) ATPR 41-911, 46,621.

¹⁷ [2004] FCA 1678, [46].

¹⁸ (1999) ATPR 41-732, 43,511-43,512.

¹⁹ [2002] FCA 1586 at [97].

²⁰ [2004] FCA 1678 at [46].

²¹ [1999] FCA 954 at [180].

²² 363 F 3d 761, 776 (8th Cir 2004).

Moreover, the distinction between “naked restraints” and “ancillary restraints” in US antitrust law is the subject of legion conflicting decisions and divergent commentaries.²³

- The dictum of Lockhart J in the *Radio 2UE case* was not cast in terms of the doctrine of ancillary restraints or the rule of reason. There is no reported case in Australia or New Zealand that specifically discusses the possibility of reading the doctrine of ancillary restraints into the per se prohibitions under the TPA or the *Commerce Act 1986 (NZ)*.²⁴

In Australia, the availability of the joint venture defences under ss 76C and 76D makes it unnecessary in the context of joint ventures to attempt to rewrite s 45A(1) or s 4D by amending these provisions to read “except where the provision improves competition”: obviously the defences will apply where a provision improves competition.

For many joint venture arrangements today in Australia there is no need to try to invoke the US doctrine of ancillary restraints: if a price fixing or exclusionary provision is pro-competitive or competitively neutral then there will be a good prospect of being able to rely successfully on a s 76C or s 76D defence. However, a s 76C or s 76D defence will not help a defendant where the provision is likely to substantially lessen competition even if the joint venture creates public benefits that outweigh the detriment of a lessening of competition.²⁵ In that situation the legislative intention of the TPA is to subject the conduct to per se liability unless the defendant obtains an authorisation by the ACCC or can rely on an exemption under s 45 or s 51.

2.6 Need for caution – the limitations of the joint venture defences under ss 76C and 76D

The defences under ss 76C and 76D of the TPA have two important limitations:

²³ For an incisive critique, see the recent paper by Lemley & Leslie, “Categorical Analysis in Antitrust Jurisprudence” (2007) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026967).

²⁴ Correctly understood, the proposition that there is no controlling or maintaining of a price (under s 45A(1) of the TPA or s 30 of the *Commerce Act*) where a price-related provision has merely an “incidental effect” on price has nothing to do with the US doctrine of ancillary restraints – for plausible and implausible interpretations of what is meant by references to “incidental effect” in the relevant case law, see Part 4.1 below.

²⁵ See further Corones, *Competition Law in Australia* (4th ed) 38-43; Williams & Woodbridge, “The Relation of Efficiencies to the Substantial Lessening of Competition Test for Mergers: Substitutes or Complements?” (2002) 30 ABLR 435. Efficiencies are relevant to the competition test where they are likely to be pro-competitive: *Shell (Petroleum Mining) Co Ltd v Kapuni Gas Contracts Ltd* (1997) 7 TCLR 463 at 529-531.

- (1) a defendant who pleads a joint venture defence carries the evidentiary and persuasive burden of establishing that the elements of the defence are made out on the facts of the case; and
- (2) as noted in Part 2.5, the defences will not be of any use where a joint venture is likely to achieve significant efficiencies but is nonetheless likely to substantially lessen competition in a market – authorisation will be necessary in such a case unless the parties can rely on an escape route under s 45 or s 51 (see Part 2.3 above).²⁶

It should also be noted that the ACCC and the courts will balk at interpretations of ss 76C and 76D that are likely to create a loophole in the operation of the per se civil penalty prohibitions. Allan Fels has drawn attention to the relative laxity of ss 76C and 76D as compared with the much stricter approach under the previous law:²⁷

.. the recommendations concerning joint ventures [ie as later adopted in ss 76C and 76D] would also seriously threaten the application of the TPA. Presently there is provision for more lenient treatment of price fixing, market sharing and the like in relation to genuine joint ventures. The provisions define joint ventures very tightly. But Dawson has recommended a very loose definition of joint venture. Such a law would mean that it should be comparatively easy if competitors want to agree on prices, or to divide up a market between them, simply to establish themselves as a joint venture. Such actions would only be prohibited if the commission could establish in a court of law that there was 'a substantial lessening of competition'. The British Airways/Qantas pricing agreement on the Kangaroo Route would almost certainly have not been subjected to an authorisation application under the looser joint venture approach. Had the proposed new definition applied the important challenge to the banks' credit cards cartel - as we saw it - which played a crucial role in setting the RBA credit card reforms, would have been made immensely difficult and would quite probably not have proceeded.

²⁶ Consider eg *Qantas Airways Limited* [2004] ACompT 9. It would be very difficult on the facts of that case to establish that there was no likelihood of substantially lessening competition, either at the time before Pacific-Blue had entered the market and Emirates had promoted its brand, or after that entry. Similarly, on the facts of *Texaco Inc v Dagher*, 547 US 1 (2006) difficulty might also arise in proving the absence of any likely substantial lessening of competition.

²⁷ "Looking Back on Ten Years of Australian Competition Law" (2003) 11 CCLJ LEXIS 15.

Fels' observations underline the need for care when interpreting what is meant by a "joint venture" and a provision "for the purposes of" a joint venture – see Parts 3.2 and 3.3 below.

3. THE ELEMENTS OF THE JOINT VENTURE DEFENCES UNDER SECTIONS 76C and 76D

3.1 Three key elements

The joint venture defences under ss 76C and 76D have three key elements:

- (1) the need for a “joint venture”;
- (2) the requirement that the price fixing or exclusionary provision in issue be “for the purposes” of the joint venture.
- (3) the price fixing or exclusionary provision must be shown not to have the purpose, effect or likely effect of substantially lessening competition in a market.

Elements (1) and (2) raise issues of interpretation that have yet to be tested in litigation.

Element (3) is a competition test based on the competition test under s 45.²⁸ The discussion below focuses on elements (1) (Part 3.2) and (2) (Part 3.3).

3.2 “Joint venture”

The term “joint venture” in sections 76C and 76D is subject to s 4J of the TPA. Section 4J provides:

In this Act:

- (a) a reference to a joint venture is a reference to an activity in trade or commerce:

²⁸ For useful discussions of the application of this test to joint ventures, see King, “Short of a Merger: The Competitive Effects of Horizontal Joint Ventures” [1999] CCLJ LEXIS 3; Pearson, “How are Joint Ventures Treated under the Act? (2001) 32 ACCC Journal 17; Tyson, “Joint Venture Regulation in Australia: An Update” (2006) 34 ABLR 211; and compare FTC/DOJ, *Antitrust Guidelines for Collaborations Among Competitors* (2000); ABA, *Joint Ventures: Antitrust Analysis of Collaborations Among Competitors* (2006); Veltman, “The US Competitor Collaboration Guidelines: Of What Significance are They to the Australian Law on Joint Ventures?” [2000] CCLJ LEXIS 10; European Commission, Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, July 2007.

- (i) carried on jointly by two or more persons, whether or not in partnership; or
- (ii) carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate; and ...

Under s 4J, a “joint venture” requires: (a) an “activity in trade or commerce”; (b) in the case of unincorporated joint ventures, the carrying on that activity “jointly by two or more persons”; and (c) in the case of incorporated joint ventures, a body corporate formed for the purpose specified in s 4j(a)(ii).

“Joint venture” otherwise bears its ordinary meaning, in the sense elaborated by the High Court of Australia in *United Dominions Corporation Limited v Brian Proprietary Limited*.²⁹

The term "joint venture" is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill. Such a joint venture (or, under Scots' law, "adventure") will often be a partnership. The term is, however, apposite to refer to a joint undertaking or activity carried out through a medium other than a partnership: such as a company, a trust, an agency or joint ownership. The borderline between what can properly be described as a "joint venture" and what should more properly be seen as no more than a simple contractual relationship may on occasion be blurred. Thus, where one party contributes only money or other property, it may sometimes be difficult to determine whether a relationship is a joint venture in which both parties are entitled to a share of profits or a simple contract of loan or a lease under which the interest or rent payable to the party providing the money or property is determined by reference to the profits made by the other. One would need a more confined and precise notion of what constitutes a "joint venture" than that which the term bears as a matter of ordinary language before it could be said by way of general proposition that the relationship between joint venturers is necessarily a fiduciary one ...

²⁹ (1985) 157 CLR 1 at 10.

Much of the litigation concerned with joint ventures has involved questions of fiduciary obligation (see eg *Gibson Motorsport Merchandise Pty Ltd and Others v Forbes*³⁰) and whether or not particular joint ventures are partnerships. However, the term “joint venture” in sections 76C and 76D is not concerned with the existence or otherwise of any fiduciary obligation: there may be a joint venture without any fiduciary obligation and there may be a fiduciary obligation without any joint venture. Moreover, joint ventures that are also partnerships come within the scope of ss 76C and 76D.

Does the concept of a “joint venture” in ss 76C and 76D require integration of functions and likely efficiencies? “Yes” is the answer given in Pengilley in “Thirty Years of the Trade Practices Act: Some Thematic Conclusions”.³¹

The major criterion of a joint venture which should not be condemned per se is the quality of integration. If a new venture is set up by two corporations and there is substantial, even if not total, integration of production, managerial, distribution, financial and other operations, then the venture should be subject to a competition test. If this integration does not exist, the joint venture may simply mask a cartel and should be condemned accordingly. . . .

Much the same position is taken in Harpham, Robertson & Williams, “The Competition Law Analysis of Collaborative Structures”, where it is stressed that a joint venture under ss 76C and 76D requires more than merely a contractual relationship and that the plus required is:³²

“... the efficiencies and other benefits that collaborations bring and which could not be obtained alone. These efficiencies have been identified many times and arise in many ways: economies of scale at research and development stage and manufacturing and marketing stages; the spreading of risks; synergies through the amalgamation of complementary assets; overcoming market failures that inhibit individual firms.”

Interpretations such as these may go beyond the ordinary meaning of the words “joint venture” endorsed by the High Court of Australia in *United Dominions Corporation Limited v Brian Proprietary Limited*. However, it is prudent to assume that the ACCC and the courts will adopt a purposive interpretation of ss 76C and 76D in order to guard against

³⁰ [2006] FCAFC 44.

³¹ (2004) 12 CCLJ 6 at [45].

³² (2006) 34 ABLR 399 at 419.

the joint venture defences becoming too easy a way around the per se prohibitions against price fixing and exclusionary provisions.³³

What purposive interpretation is likely to be adopted? The Explanatory Memorandum gives this limited guidance:

“[g]enuine joint venture activity which does not substantially lessen competition will be a defence under these provisions.”³⁴

“[showing the existence of a “joint venture”] will ordinarily require the parties to provide evidence that the activity in question is separable from the activities they are individually engaged in and evidence of each party’s contribution to that activity, for example, the capital or skill.”³⁵

“if the only activity being carried on jointly by the parties is the activity of making, or giving effect to, a contract arrangement or understanding containing an exclusionary provision or other illegal provision, then the provision in question cannot be for the purposes of a joint venture”.³⁶

A harder-edged purposive interpretation is that a “joint venture” under s 76C or s 76D requires the integration of functions and the likelihood of achieving efficiencies as a result of that integration of functions (“economic integration”).³⁷

The type and extent of economic integration required to make a joint venture a genuine joint venture is clarified in Werden, “Antitrust Analysis of Joint Ventures:”³⁸

Any genuine economic integration that plausibly could confer non-trivial social benefits suffices to take a joint venture outside the purview of the per se rules applied to cartel activity. The requisite economic integration is present in a joint venture whenever the participants’ joint undertaking of one or more facets of product development, production, distribution, or marketing plausibly reduces

³³ Consider eg *Timken Roller Bearing Co v US*, 341 US 593 at 598 (1951); *General Leaseways, Inc v National Truck Leasing Association*, 744 F 2d 588 (CA 7th Cir, 1984).

³⁴ Para 1.10.

³⁵ Para 5.283.

³⁶ Para 5.284.

³⁷ See eg *Texaco Inc v Dagher*, 547 US 1 at 4 (2006) (noting that the creation of Equilon, the joint venture vehicle, was based on “numerous synergies and cost efficiencies” and that “nationwide there would be up to \$800 million in cost savings annually”).

³⁸ (1998) 66 Antitrust LJ 701, at 713-715.

cost to a nontrivial extent, or plausibly allows the joint venture to offer a product both valued by consumers and that the individual venture participants could not have individually offered. A business *function*, however, must be performed jointly; jointly making a business *decision* does not suffice. Thus, the requisite economic integration may be present with a sales joint venture that does market research, makes calls on potential customers, or maintains showrooms, but not with one that merely sets prices.

In determining whether the per se rule may apply, the issue is not whether the venture actually achieves any social benefits. A joint venture yielding no social benefits may merit rule of reason treatment, while a joint venture achieving significant social benefits could be per se illegal. The per se rule should not be applied if an integration is reasonably calculated to achieve social benefits, even if it fails to do so; a research and development joint venture should not become per se illegal merely by virtue of its failure to produce any useful new products or processes. Moreover, the per se rule may apply to a venture that achieves social benefits with no integration of economic activity. A joint venture that merely allocates customers might significantly reduce transportation costs but would not entail any integration, and so would be per se illegal.

The requisite integration may exist even though some joint venture participants make no non-monetary contributions to the venture. If a firm distributes a rival's product, thus eliminating the need for the rival to maintain a distribution system, the requisite integration is present even though the rival contributes nothing to the venture but a monthly payment for services rendered. Moreover, the requisite integration may not exist despite substantial sharing of financial risks among joint venture participants. If several competitors agree merely to pool all revenues and divide them according to preset shares, the arrangement is a cartel with no potentially efficiency-enhancing economic integration.

The issue of economic integration has arisen in numerous joint venture antitrust cases in the USA. The judgment of Posner J in *General Leaseways, Inc v National Truck Leasing Association*³⁹ is one instructive example.

The uncertainty of the term "joint venture" under ss 76C and 76D is best resolved by statutory redefinition. The definition proposed by Pengilly is commendable:⁴⁰

³⁹ 744 F 2d 588 (CA 7th Cir, 1984).

- (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.

3.3 “For the purposes of” a joint venture

The wording “for the purposes of” a joint venture in ss 76C and 76D is far from clear and a source of much vexation in Australian commerce.

The Explanatory Memorandum states that “[g]enuine joint venture activity which does not substantially lessen competition will be a defence under these provisions.”⁴¹ The meaning of “genuine joint venture activity” is not elucidated.

The requirement of ss 76C and 76D that a price fixing or exclusionary provision be “for the purposes of” a joint venture is open to numerous possible interpretations. The main variables are as follows:

- (1) Must the provision be conducive to achieving the commercial objectives of the joint venture? Or must the provision be reasonably necessary to achieve the commercial objectives of the joint venture?
- (2) Must the provision be believed by all parties to the joint venture to be necessary to achieve the commercial objectives of the joint venture? Is it sufficient that the belief as to necessity be entertained only by the parties “responsible for introducing the provision”?⁴² Is it sufficient that the belief

⁴⁰ “Thirty Years of the Trade Practices Act: Some Thematic Conclusions” (2004) 12 CCLJ 6 at [46]-[47].

⁴¹ Para 1.10.

⁴² That being the interpretation of the words “purpose of a provision” in section 45 adopted in *Seven Network Limited v News Limited* [2007] FCA 1062 at [2402] ff.

as to necessity is entertained only by two or more of the parties to the joint venture? Merely by the party who is pleading the defence under s 76C or s 76D?

- (3) Must the provision satisfy both an objective test under (1) and a subjective test under (2)?

It has been suggested that the requirement of a provision “for the purpose of a joint venture” means a provision that the parties to the joint venture would not have entered into the joint venture without.⁴³ However, with respect, that cannot be right because such an interpretation would allow price fixers to side-step the per se civil penalty prohibitions by showing that they would not have entered into a joint venture arrangement except for the purpose of using it as a sham to cloak price fixing.

The view is expressed in Harpham, Robertson & Williams “The Competition Law Analysis of Collaborative Structures” that s 76C and s 76D require that the price fixing or exclusionary provision in issue be “proportionate to” the objectives of the joint venture in the sense of the principle of proportionality that is applied in US antitrust law under the doctrine of ancillary restraints.⁴⁴ However, that interpretation is open to question:

- The wording “for the purposes of” does not require more than that the provision be conducive to achieving the objectives of the joint venture.
- As a matter of purposive interpretation, it is difficult to accept that the legislative intention is either to import the US doctrine of ancillary restraints or to impose a major threshold barrier to be overcome by defendants who wish to rely on the ss 76C and 76D joint venture defences. Importing the US doctrine of ancillary restraints or a test of whether or not the price fixing or exclusionary provision was objectively necessary for the joint venture would complicate proceedings where the defence is raised and would impose a considerable hurdle. There is no statutory basis for a “quick look” procedure of the kind used in the US for distinguishing between “naked restraints” and restraints to which the rule of reason applies.⁴⁵

⁴³ Corones, *Competition Law in Australia* (4th ed) 302.

⁴⁴ (2006) 34 ABLR 399 at 402, 427.

⁴⁵ See eg *Craftsmen Limousine v Ford Motor Co*, 363 F 3d 761, 776 (8th Cir 2004), which is an instructive example of the complexity of the analysis required under US antitrust law.

- The more obvious purposive intention, as stated in the Explanatory Memorandum, is that “[g]enuine joint venture activity which does not substantially lessen competition will be a defence under these provisions.”⁴⁶ Genuine joint venture activity may exist where, as a matter of objective assessment, a provision is not reasonably necessary to achieve the objectives of the joint venture. The parties may genuinely but mistakenly believe that a provision is necessary for achieving the objectives of a joint venture but are mistaken. Another possibility is that the parties genuinely but mistakenly believe on reasonable grounds that a provision is necessary for achieving the objectives of a joint venture but are mistaken.

In my view, the interpretation of the requirement that the price fixing or exclusionary provision be “for the purposes” of a joint venture that is consistent with the subjective intentionality implied by the word “purposes”⁴⁷ and with the focus on “genuine joint venture activity” in the Explanatory Memorandum is as follows:

- the defendant believed the provision to be necessary to achieve the objectives of a joint venture,⁴⁸
- a “joint venture” has the meaning specified in Pengilley’s proposed definition:⁴⁹
 - (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

⁴⁶ Para 1.10.

⁴⁷ “Purpose” in TPA s 4D was interpreted as requiring subjective intention in *News Limited v South Sydney District Rugby League Football Club Ltd* [2003] HCA at [18] per Gleeson CJ. Contrast the objective purpose analysis in Robertson, “The Primacy of Purpose in Competition Law – Pt 2” (2002) 9 CCLJ 101.

⁴⁸ A requirement that the requisite intention and belief be entertained by all parties to the joint venture (as distinct from the defendant alone or perhaps all persons “responsible for introducing” the provision) would be very demanding; s 76C and s 76D do not appear to be that stringent.

⁴⁹ “Thirty Years of the Trade Practices Act: Some Thematic Conclusions” (2004) 12 CCLJ 6 at [46]-[47]. See further the discussion of economic integration in Part 3.2 above.

between them using in common the resources contributed by each of them.

ACCC guidelines on ss 76C and 76D might help but have not emerged (contrast the Dawson Committee Report (2003) which recommended that the ACCC publish guidelines⁵⁰). The ACCC Merger Guidelines are relevant to the application of the substantial lessening of competition test under sections 76C and 76D, but do not assist on the meaning to be given to the terms “joint venture” and a provision “for the purposes of” a joint venture.

⁵⁰ *Review of the Competition Provisions of the Trade Practices Act (2003)* 18.

4. IS SECTION 76D A COMMENDABLE MODEL FOR AMENDMENTS TO SECTION 30 OF THE COMMERCE ACT?

4.1 The limitations of the joint venture exemptions under s 31 and their practical significance in the context of s 30

The joint venture exemptions under s 31 have been widely criticised for being unduly narrow. As Lear has observed:⁵¹

- the required elements of "joint supply" or "supply by parties ... in proportion to their respective interests" and of goods "jointly produced" by the parties are often absent and are an arbitrary limitation on the scope of the exemption for unincorporated joint ventures; and
- although the requirement of products having to be supplied or acquired in proportion to interests held does not apply in the case of incorporated joint ventures, there are still many situations where joint venture companies only handle, or develop, but do not "produce" products and thereby fall outside the s 31 exemption.

The limits of the joint venture exemptions under s 31 induce parties to joint ventures to look for other ways of avoiding the operation of the prohibition against price fixing under s 30. However, while other escape routes do exist they are also limited in scope.

For example, the requirement for price fixing under s 30 that the parties be in competition with each other in relation to the goods or services subject to the alleged price fixing is subject to a strict "but for" test, ie but for the contract, arrangement or understanding would the parties be likely to be competitors in relation to the relevant goods or services? Some joint venture arrangements will pass this but for test (eg, where, as in *Broadcast Music Inc v. Columbia Broadcasting Service*,⁵² there is a new joint product that none of the parties could produce alone). However, many other joint venture arrangements will not pass the but for test, which partly explains the existence of the s 31 exemptions.

Another possible escape route is the argument that a price fixing effect of a price-related provision in a legitimate joint venture has only an "incidental effect" and therefore does not

⁵¹ "Joint Ventures: Treatment under New Zealand, United States and European Competition Law" (2005) 11 NZBLQ 187 at 4.3.

⁵² 441 US 1 (1979).

involve any “fixing, controlling or maintaining” of a price within the meaning of s 30.⁵³ However, the scope of the “incidental effect” escape route is very narrow, as explained below.

“Incidental effect” has various possible meanings, most relevantly the following:

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

In my view, an “incidental effect” in the sense of meanings (1), (3), or (5) is not within the meaning and scope of section 30. For example, the fact that the effect of controlling or maintaining a price is unintended does not take it outside the operation of section 30 – it is sufficient under s 30 that a provision has the effect or likely effect of fixing, controlling or maintaining a price. By contrast, an “incidental effect” in the sense of meaning (2) or (4) is within the meaning and scope of s 30.

There is no explicit indication in the *Radio 2UE case*⁵⁴ or elsewhere of any intention to exclude from the application of s 30 any effects that are “incidental” in the sense of meanings (2) or (4). In the *Radio 2UE case* Lockhart J stated that he generally adopted the approach taken in US cases but, in making that statement, it is most unlikely that he impliedly endorsed meanings (2) or (3). In any event, the Full Federal Court did not endorse meanings (2) or (3) but stated that there must be “an element of intention or likelihood to affect price competition

⁵³ See *Re: Radio 2UE Sydney and Stereo FM Pty Limited and 2 Day-FM Limited* (1982) 62 FLR 437 at 448 (Lockhart J); *Re Insurance Council of NZ (Inc)* (1989) 2 NZBLC (Com) 99-552 at 104,482; *Electricity Governance Board Limited*, Decision No 473 (2002) at para 136; Pengilly, *Price-fixing and Exclusionary Provisions* (2001) at 32-33; Round & Siegfried, “Horizontal Price Agreements in Australian Antitrust: Combatting Anti-Competitive Corporate Conspiracies of Complicity and Connivance” (1994) 9 *Rev of Industrial Economics* 569 at 592.

⁵⁴ *Re: Radio 2UE Sydney and Stereo FM Pty Limited and 2 Day-FM Limited* (1982) 62 FLR 437 at 448 (Lockhart J).

before price 'fixing' can be established"⁵⁵ – that statement directly reflects the statutory wording of s 45A(1) of the TPA and is consistent only with meanings (1), (3) and (5) above.

Given the narrowness of the s 31 exemptions and the limited scope of other possible escape routes from the clutches of the per se prohibition under s 30, should s 30 be amended to exclude genuine joint venture arrangements? What are the main alternative possible approaches?

4.2 Main alternative possible approaches

The main possible alternative approaches are to make the prohibition against price fixing under s 30 subject to:

- (1) a defence corresponding to that under section 29(1A);
- (2) a joint venture defence corresponding to that under s 76D of the TPA;
- (3) a joint venture defence comparable to that under s 76D of the TPA but which is defined much more clearly; or
- (4) a joint venture defence based on the test for an authorisation and requiring the defendant to establish that the likely public benefits outweigh any likely public detriments.

(1) A defence corresponding to that under section 29(1A)?

This approach would radically modify the per se prohibition against price fixing by providing a defence parallel to that applicable to exclusionary provisions. There is little or no apparent support for such a change.⁵⁶

⁵⁵ *Re: Radio 2UE Sydney and Stereo FM Pty Limited and 2 Day-FM Limited* (1983) 68 FLR 70 at 72.

⁵⁶ The Canadian prohibition against price fixing is subject to a competition test but the Canadian approach has not been influential in Australia or New Zealand.

(2) A joint venture defence corresponding to that under s 76D of the TPA?

Introducing a defence corresponding to that under s 76D of the TPA would have many advantages, as discussed in Part 2 in the context of the liberating effects that the joint venture defences under ss 76C and 76D have brought about in Australia.

However, the drafting of s 76D is vague and has created considerable commercial uncertainty – see Part 3.

(3) A joint venture defence comparable to that under s 76D of the TPA but defined much more clearly?

The wording of s 76D would be much clearer if the following changes were made:

- define the element of a “joint venture” in terms that require an economic integration of functions that is likely to achieve efficiencies, as proposed by Pengilley;⁵⁷
- delete the words “for the purposes of a joint venture” and replace with the words “believed by the person to be necessary to achieve the objectives of a joint venture.”

The reasons for these changes are as discussed in Parts 3.2 and 3.3 above.

(4) A joint venture defence based on the test for an authorisation and requiring the defendant to establish that the likely public benefits outweigh any likely public detriments?

This approach would enable parties to avoid the delay and cost of the authorisation while signaling that, in the event of a challenge under s 30, they will be put to proof of the pro-competitive or other benefits of the joint venture and the necessity for the price fixing provision in issue.

The prevailing assumption seems to be that the assessment of relative benefits and detriments is best made initially by the Commission rather than by a court at first instance.⁵⁸ However,

⁵⁷ “Thirty Years of the Trade Practices Act: Some Thematic Conclusions” (2004) 12 CCLJ 6 at [46]-[47].

not to take efficiencies into account when determining whether or the per se prohibition against price fixing should apply to joint venture arrangements seems out of touch with commercial reality.⁵⁹ A notification procedure parallel to the collective bargaining notification under Part VII, Division 2, Subdivision B of the TPA may be unworkable in the context of joint ventures given their much greater prevalence. An alternative possible compromise approach may be:

- (1) to provide for joint venture parties to prepare, if they choose to do so at the time of entering into the venture, a detailed self-assessment of the likely efficiencies and adverse competition effects of the venture and whether or not the efficiencies clearly outweigh any lessening of competition; and
- (2) to require the Commission to take any such self-assessment into account during the investigation of a possible breach of s 30 and before deciding to bring an enforcement action.

This approach would be similar to that adopted by the European Commission⁶⁰ except that self-assessments would be voluntary. Guidelines as to the content and format of self-assessments would be desirable; the bureaucratic excesses of the European model would need to be avoided.⁶¹

4.3 Is the joint venture defence under s 76D of the TPA a commendable model?

In my view, the joint venture defence under s 76D of the TPA is not a commendable model as it stands. The wording is unclear and generates commercial uncertainty. However, consideration should be given to amending s 30 by introducing a defence comparable to that under s 76D but worded so as clarify the requisite elements of the defence – see Part 4.2(3) above.

⁵⁸ See eg Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) 56-57 (rejecting the idea of making efficiencies relevant to liability under TPA s 50 (mergers)).

⁵⁹ See Harpham, Robertson & Williams, “The Competition Law Analysis of Collaborative Structures” (2006) 34 ABLR 399.

⁶⁰ European Commission, Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, July 2007. See further Tyson, “Joint Venture Regulation under European Competition Laws: An Update” (2007) 13 European LJ 408, especially at 412-414 (commenting on the self-assessment approach adopted before and leading up to the adoption of the Consolidated Jurisdictional Notice).

⁶¹ See Tyson, “Joint Venture Regulation under European Competition Laws: An Update” (2007) 13 European LJ 408 at 414.

5. FUTURE PAIN? THE TREATMENT OF JOINT VENTURES UNDER THE AUSTRALIAN EXPOSURE DRAFT BILL (2008) ON CARTEL CRIMINALISATION

The Exposure Draft Bill released by the Australian Treasury for public consultation⁶² has two highly controversial features, namely the absence of any joint venture defence to the proposed new cartel offences and, for the proposed new civil penalty prohibitions against cartel conduct, the absence of a joint venture defence for incorporated joint ventures.

The criticisms set out below are based closely on those voiced recently in Beaton-Wells and Fisse, “Criminalising Serious Cartel Conduct: Issues of Law and Policy - A Critique of the Exposure Draft Bill, Draft ACCC-CDPP MOU and Discussion Paper introducing criminal penalties for serious cartel conduct in Australia.”⁶³

5.1 No joint venture defence to the proposed new cartel offence

Section 44ZZRO of the Exposure Draft Bill provides for a joint venture defence akin to (but not identical with) the joint venture defences under ss 76C and 76D. However, the s 44ZZRO defence applies only to the civil penalty prohibitions under ss 44ZZRJ and 44ZZRK – it does not apply to the new cartel offences under ss 44ZZRF and 44ZZRG.⁶⁴ This is highly controversial:

- The failure to include a joint defence parallel to that provided for in ss 76C and 76D is impossible to reconcile with the former Treasurer’s Press Release of 2 February 2005 where Mr Costello stated that:

“Further amendments to the Trade Practices Act 1974 (Cth) will flow from the Dawson Review recommendations relating to joint ventures and the report of the Intellectual Property and Competition Review Committee. These amendments may permit certain types of conduct where it does not substantially lessen competition.

⁶² <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1330>.

⁶³ Paper presented at the University of Sydney, 21 February 2008, and the University of Melbourne, 25 February 2008. A revised version of this paper is included in a submission to the Australian Treasury, available at: http://www.treasury.gov.au/documents/1350/PDF/Beaton-Wells_Fisse.pdf.

⁶⁴ This is not to suggest that the joint venture defence should be defined in the same way for the purposes of criminal and civil liability. Arguably the civil defence should be more demanding or less generous than the criminal defence; see Fisse, “The Cartel Offence: Dishonesty?” (2007) 35 ABLR 235 at 272.

Legitimate joint ventures and intellectual property arrangements will not be penalised under the cartel offence and will only be penalised under the revised per se civil prohibitions where they substantially lessen competition.”

- The rationale behind s 44ZZRO may be that legitimate joint ventures will not involve an intention dishonestly to obtain a gain and hence will fall outside the scope of the new cartel offences. However, the concept of an intention dishonestly to obtain a gain is ill-defined⁶⁵ and its application will depend on whatever content juries happen to give to it. By contrast, the test of liability under a defence based on s 76C or s 76D is less amorphous, albeit in need of further clarification.⁶⁶
- The thinking behind s 44ZZRO may be that the competition test under the s 44ZZRO defence is unsuitable for determination by a jury. However, if the aim is to preclude jury consideration of the competition effects of joint ventures, that aim would be forlorn. As part of a denial that an accused acted with an intention dishonestly to obtain a gain, defence counsel will introduce evidence of the reasons why an accused used a joint venture and why the use of that joint venture was believed by the accused to be pro-competitive. It may be noted that denial of an intention to dishonestly obtain a gain does not impose a persuasive burden of proof on a accused – the prosecution must prove its case beyond a reasonable doubt. By contrast, the joint venture defence under s 44ZZRO imposes a persuasive burden on an accused to establish that the cartel provision did not have the purpose, effect or likely effect of substantially lessening competition in a market.

⁶⁵ See Fisse, “The Cartel Offence: Dishonesty?” (2007) 35 ABLR 235 at 259-266.

⁶⁶ See Parts 3.3 and 4.2(3) above.

5.2 No joint venture defence to the proposed new civil penalty prohibitions for incorporated joint ventures

Section 44ZZRO provides:

- (1) This section applies to a proceeding for a contravention of s 44ZZRJ or 44ZZRK in relation to a contract, arrangement or understanding containing a cartel provision.
- (2) In the proceeding, it is a defence if the defendant proves that:
 - (a) the parties to the contract, arrangement or understanding are, or will be, carrying on a joint venture covered by subparagraph 4J(a)(i); and
 - (b) the cartel provision is for the purposes of the joint venture; and
 - (c) the cartel provision does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition.

Contrast s 76C and s 76D, which apply respectively to an exclusionary provision and a price fixing, provision that is “for the purposes of a *joint venture*” (emphasis added). The defences under s 76C and s 76D apply in relation to incorporated joint ventures as defined in s 4J(a)(ii) as well as to unincorporated joint ventures as defined in s 4J(a)(i). The non-inclusion of incorporated joint ventures under the joint venture defence in s 44ZZRO is unjustified.

5.3 Relevance or otherwise of the Australian Exposure Draft Bill provisions on joint ventures to the possible criminalisation of serious cartel conduct under the *Commerce Act*

The joint venture provisions of the recent Australian Exposure Draft Bill are highly problematic. In my view, they should not be followed in Australia, New Zealand or anywhere else – see Parts 5.1 and 5.2 above.