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The Australian Cartel Criminalisation Proposals: An Overview and Critique

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The Australian Treasurer issued a press release on 2 February 2005 outlining proposals for the criminalisation of serious cartel conduct. The proposals depart from the Enterprise Act model in many ways but have some common features including reliance on the concept of dishonesty as an element of the cartel offence. This article is an overview and critique of what the proposals say, or do not say, about: (1) dishonesty as a problematic element of a cartel offence; (2) the requirement of 'an intention to obtain a gain'; (3) the mental element of the cartel offence; (4) the element of agreement for the cartel offence; (5) the \$1 million value of affected commerce threshold for prosecution; (6) the principle of corporate criminal responsibility that is to apply to the cartel offence; (7) the defences and exemptions that will apply to the cartel offence; (8) sentencing options and maximum penalties, and the application of proceeds of crime legislation and money-laundering offences; and (9) numerous other questions, including the challenge of defining the cartel offence in terms that can readily be communicated to a jury, the need for a 'one-stop' process for handling applications for immunity from both criminal prosecution and enforcement action for civil penalties, and whether powers of telecommunications interception should be available. Most of these issues are not straightforward and should have been referred to the Australian Law Reform Commission for full examination and due public consultation. Exposure draft legislation has yet to be provided. Legislation may be introduced in 2008 after the forthcoming Federal election.

**THE AUSTRALIAN GOVERNMENT'S PROPOSALS FOR THE CRIMINALISATION OF
SERIOUS CARTEL CONDUCT**

Proposals for the criminalisation of serious cartel conduct were announced by the Australian Treasurer in a press release on 2 February 2005 (Criminalisation Proposals; Press Release). The cartel offence to be introduced under those proposals will prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the contract, arrangement or understanding is made or given effect to with the intention of dishonestly obtaining a gain, pecuniary or non-pecuniary and for the defendant or another person, from a person or class of persons likely to acquire or supply the goods or services to which the cartel relates (Australian Cartel Offence). The maximum penalties for the Australian Cartel Offence will be a term of imprisonment of five years and a fine of \$220,000 for individuals and a fine for corporations that is the greater of \$10 million or three times the value of the benefit

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from the cartel, or where the value cannot be determined, 10 per cent of annual group turnover.

The criminalisation of cartel conduct in Australia, as elsewhere, raises many issues of design. Key issues of design were not resolved by the Dawson Committee *Review of the Competition Provisions of the Trade Practices Act* in January 2003 and, remarkably, the task of completion of the review of the criminalisation of cartel conduct was remitted to the Government.¹ The Government announced on 3 October 2003 that a Working Party on Penalties for Cartel Behaviour (Working Party) would consider outstanding issues before the end of 2003.² The Working Party's recommendations and report have not been published (they are currently the subject of a freedom of information application).³ The Treasury papers for the 2006 Commonwealth Budget said that the criminal cartel provisions were to be introduced to Parliament in the 2006 winter sittings.⁴ However, they have yet to be introduced into Parliament and the Government has not released an exposure draft Bill. Legislation may be introduced later this year or in 2008 after the forthcoming Federal election.

Although the Criminalisation Proposals have been influenced by the cartel offence provisions in the Enterprise Act 2002 (UK), they do not follow the Enterprise Act model in various significant ways.

The Criminalisation Proposals disappoint. Many questions surround the Proposals, largely because there has been no detailed public review of the issues by a law reform agency.

DISHONESTY AS AN ELEMENT OF THE AUSTRALIAN CARTEL OFFENCE

Under the Criminalisation Proposals, the Australian Cartel Offence would be defined partly in terms of the element of dishonesty. This reflects the dishonesty-based cartel offence under the Enterprise Act.

I have argued in a recent paper at some length that the concept of dishonesty is problematic and unnecessary as an element of the Australian Cartel Offence,⁵ for these main reasons:

- (1) the Criminalisation Proposals fall short of adequately reflecting the elusive notion of 'serious cartel conduct' largely because the requirement of an 'intention to

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

² Treasurer, Press Release, 3 October 2003. See also Clarke, 'Criminal Penalties for Contraventions of Part IV of the Trade Practices Act' (2005) 10 Deakin LR 141 at 146.

³ By B Fisse and Lexpert Publications Pty Limited. This application is now the subject of an application by those parties for review by the Administrative Appeals Tribunal; copies of the application and other documents are available at <http://www.brentfisse.com>.

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

⁵ 'The Cartel Offence: Dishonesty?' (2007) 35 Australian Business Law Review 235.

dishonestly obtain a gain' is not a touchstone of serious harm or serious culpability;⁶

- (2) the idea of making dishonesty an element of a cartel offence reflects the approach taken by the Enterprise Act 2002, but the explanatory materials on dishonesty as element of the Enterprise Act cartel offence are seriously flawed and incapable of withstanding critical scrutiny;⁷
- (3) the 'standards of ordinary people' limb of the element of dishonesty is an undefined and undefinable populist notion the practical application of which will create real difficulties for judges and juries as well as for people in business and their advisers;⁸
- (4) the requirement for dishonesty of 'knowledge that the conduct was dishonest according to the standards of ordinary people' is a subjective test that will allow large and sophisticated corporations to deny liability and quite possibly obtain an acquittal on the basis of mistake of law and self-preferring subjectivised beliefs about the morality of their conduct;⁹ and
- (5) the element of dishonesty is unnecessary given that there are several possible alternative ways of limiting a cartel offence to serious cartel conduct, including:¹⁰
 - (a) requiring, as a jurisdictional element of the cartel offence and as a guideline for the exercise of prosecutorial discretion, that the specific line of commerce affected by the cartel is likely to represent a minimum percentage (say 20%) or more of the value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market during the period when that specific line of commerce was affected by the cartel or a specified period linked to the time of the alleged offence;
 - (b) requiring, as the core mental element for the offence, a common intention: (i) to fix prices or restrict supply; and (ii) to increase bargaining power at the expense of those with whom the cartel deals; and
 - (c) narrowing the definition of price fixing, restricting output, bid rigging or market sharing (as by excluding the fixing of a maximum price and indirect price fixing in a downstream market).

The Enterprise Act is the only legislative model in the world to rely on dishonesty as a definitional element of a cartel offence.¹¹ No explanation is given in the Criminalisation

⁶ Ibid, at 241-244.

⁷ Ibid, at 250-253.

⁸ Ibid, at 257-261.

⁹ Ibid, at 261-266.

¹⁰ Ibid, at 266-277.

¹¹ For example, dishonesty is not required under the definition of cartel offences in the USA, Canada, Japan, Korea, France, Germany, or Ireland. The concept of dishonesty is not mentioned in OECD, *Fighting Hard-*

Proposals for following the UK model instead of, for example, the established model of section 1 of the Sherman Act (US). Instead, the Proposals seek to justify reliance on dishonesty in three short paragraphs each of which makes question-begging claims. For example, it is claimed that ‘dishonesty goes to the heart of serious cartel conduct’ and that ‘dishonesty appropriately captures the genuinely criminal nature of serious cartel conduct’.

Andreas Stephan’s recent study by of public attitudes toward price fixing in the UK¹² confirms that difficulty is likely to arise in persuading juries beyond a reasonable doubt that price fixing and other cartel conduct is dishonest:

Approximately 6 in every 10 Britons (63%) believe price-fixing is dishonest, whereas two in every ten (21%) believe it is not dishonest. This figure is lower than one would expect given that the overwhelming majority of respondents do recognise that price-fixing is wrong ...

Only 7% of respondents felt that price-fixing is comparable to theft. 8% felt it was comparable to fraud. A strong majority clearly had trouble relating it to any other illegal act with which they were familiar.¹³

There is no reason to believe that there is any consensus in Australia that price fixing and other cartel conduct is dishonest. Moreover, it is inevitable that defence counsel will mine and exploit latent ambivalence on the part of jurors. Defence counsel will focus on examples (including export cartels and shipping conferences) where cartel conduct is lawful. They will also construct explanations or justifications for the conduct alleged that are calculated to cancel out any prior simplistic images of theft, fraud or extortion.¹⁴

INTENTION TO OBTAIN A GAIN AS AN ELEMENT OF THE AUSTRALIAN CARTEL OFFENCE

The Australian Cartel Offence would require not only dishonesty but also an intention to obtain a gain. The reasons for this particular departure from the Enterprise Act model are not explained in the Criminalisation Proposals.¹⁵

At first sight, the requirement of an intention to obtain a gain seems almost trivial given that the gain intended by a defendant may be miniscule and yet still amount to a ‘gain’. However, Philip Williams has raised the interesting possibility that, in the context of

Core Cartels (2002), nor by the ICN Working Group on Cartels in *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties* (2005).

¹² Stephan A, *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?abstract_id=993407.

¹³ *Ibid*, at 16-17. See also MacCulloch A, ‘Honesty, Morality and the Cartel Offence’ (2007) 28 *European Competition Law Review* 353.

¹⁴ See Fisse (2007) *ABLR* 235 at 263-265.

¹⁵ The offence of acting with intent dishonestly to obtain a gain from a Commonwealth entity under section 135 of the Criminal Code (Cth) appears to have been a model.

price fixing, the wording of the Press Release – ‘intention to obtain a gain from a person or class of persons likely to acquire or supply the goods or services to which the cartel relates’ - may usefully limit the scope of the Australian Cartel Offence. This wording ‘may mean that the gain by a selling cartel must be at the expense of those to whom they sell and that the gain by a buying cartel must be made at the expense of those from whom they buy’.¹⁶ If so, then in effect there must be an intention to increase bargaining power at the expense of those with whom the cartel deals. Williams has pointed out, requiring such an intention will exclude liability in four situations where there is no case for imposing liability for price fixing.

Collaborative Agreements Entered Into to Create Value

A requirement of proof that the agreement among competitors entered into the agreement did so with the intention of increasing their bargaining power at the expense of those with whom they deal would seem to avoid catching agreements that were entered into to create value: it will only catch agreements that were entered into to increase bargaining power at the expense of those with whom the competitors deal.¹⁷

Agreements with No Sustained Effect on Price Levels

A requirement of proof that the agreement among competitors entered into the agreement did so with the intention of increasing their bargaining power at the expense of those with whom they deal would avoid liability where, as in *Chicago Board of Trade v United States*¹⁸ and *Radio 2UE Sydney Pty Ltd*,¹⁹ there is no intention to affect price levels; ‘[t]his inoffensive class of agreements would not be caught by the new cartel offence’.²⁰

Agreements among Members of a Network that Competes Against another Network

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

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

¹⁶ Philip Williams, commentary on my paper ‘The Proposed Australian Cartel Offence: The Problematic and Unnecessary Element of Dishonesty’ at the Centre for Regulation and Market Analysis 4th Annual Trade Practices Workshop, Barossa Valley Resort, Oct 2006, at 3-4.

¹⁷ Philip Williams, commentary on my CRMA Workshop paper, at 4.

¹⁸ 246 US 231 (1918).

¹⁹ (1982) 62 FLR 437, (1983) 68 FLR 70.

²⁰ *Ibid*, at 3-4.

members of the network deal. Rather, they are intended to enable the network better to compete against rival networks – when such competition is ultimately to the benefit of those with whom the networks deal.²¹

Agreements between Negotiating Partners to Engage in Joint Negotiations

Williams points to situations where there are large numbers of buyers and sellers who all agree to a joint negotiation, as in *Re VFF Chicken Meat Growers' Boycott Authorisation*²² and in joint negotiations for IP rights. As he has explained, in this type of situation there is unlikely to be an intention to obtain a gain at the expense of any other party in the joint negotiation where none of the parties are opposed to the negotiation.²³

An intention to make a gain at the expense of a buyer may also be absent in other situations, including that where competing sellers fix a maximum price.²⁴

Arguably, the limitation elucidated by Williams should also apply to the civil per se prohibition against price fixing under section 45 of the Trade Practices Act 1974 (Cth). If so, an intention to increase bargaining power and thereby gain at the expense of a buyer or seller would not be a definitional element that would distinguish criminal from civil liability.²⁵

THE MENTAL ELEMENT OF THE AUSTRALIAN CARTEL OFFENCE IN RELATION TO PRICE FIXING, RESTRICTING OUTPUT, DIVIDING MARKETS OR RIGGING BIDS

The Criminalisation Proposals do not specify what mental element will be required in relation to the element of price fixing, restricting output, dividing markets or rigging bids. By contrast, section 188(1) and (2) of the Enterprise Act 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.

The Criminalisation Proposals are brief and do not make it clear whether intention or recklessness is the required mental element in relation to the element of price fixing, restricting output, dividing markets or rigging bids. If intention is required, the Proposals do not indicate if all parties charged must have a common intention to achieve the price fixing or other cartel conduct alleged.

²¹ *Ibid*, at 5.

²² [2006] ACompT 2.

²³ *Ibid*, at 5-6.

²⁴ See further Easterbrook, 'Maximum Price Fixing' (1981) 48 U Chicago LR 886.

²⁵ Similarly, the concept of a 'naked restraint' does not distinguish civil from criminal liability under section 1 of the Sherman Act.

Under the Criminal Code (Cth), an offence consists of physical elements and fault elements.²⁶ A physical element of an offence may be *conduct, a result of conduct or a circumstance in which conduct, or a result of conduct, occurs*. The default mental element for conduct (ie the mental element that will apply unless a different mental element is specified in the legislation creating an offence) is intention.²⁷ The default mental element for a result of conduct is recklessness. The default mental element for circumstances is recklessness. A contract, arrangement or understanding may be characterised as a conduct element (with intention as the default element) rather than as a circumstance (with recklessness as the default element) where the contract, arrangement or understanding is described in terms of conduct (eg arriving at an understanding).²⁸ The element of price fixing, restricting output, dividing markets or rigging bids is a result of conduct (with recklessness as the default element).

The default mental element of recklessness would be questionable as the mental element in relation to price fixing, restricting output, dividing markets or rigging bids.²⁹ As defined under the Criminal Code, recklessness with respect to a result requires that: (a) the accused be aware of a substantial risk that the result will occur; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. The degree of risk of which the accused must be aware is low. By contrast, in *US v United States Gypsum Co*, the United States Supreme Court held that the offences under sections 1 and 2 of the Sherman Act required proof of intention or knowledge of the probable consequences (in the case of price fixing, knowledge of the probability that the arrangement would result in the fixing of prices). The knowledge of probability test does not obviously match the aspiration of the Criminalisation Proposals to criminalise cartel conduct that is plainly serious or 'hard-core' and the forthcoming legislation may well require intention rather than knowledge of probability or recklessness.³⁰

Assuming that the Australian Cartel Offence will require intention in relation to price fixing, restricting output, dividing markets or rigging bids, will that intention need to be

²⁶ See further Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) pp 7-9; Leader-Elliott I, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26 Crim LJ 28. See generally Odgers S, *Principles of Federal Criminal Law* (2007).

²⁷ Under s 5.2(3) of the Criminal Code (Cth): 'A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events'.

²⁸ See *R v Saengsai-Or* (2004) 147 A Crim R 172.

²⁹ Contrast the submission by the ACCC to the Dawson Committee that the mental element should be recklessness: ACCC, *Submission to the Trade Practices Act Review* (June 2002) at [2.6.3].

³⁰ But note the rejection of a requirement of intention in *US v United States Gypsum Co* 438 US 422 at 445-446 (1978): 'The business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits, and risks. A requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent.'

a common intention on the part of all the parties charged as principal offenders?³¹ A submission was made to the Dawson Committee by the Law Council of Australia that it should be sufficient for the prosecution to establish intention on the part of only two parties.³² However, that is not the approach taken under section 188 of the Enterprise Act and there is no compelling reason for watering down the requirement of a common intention under section 188. A common purpose is now required for the civil penalty prohibition against exclusionary provisions under section 45 of the Trade Practices Act.³³ It is difficult to understand why the mental element of the Australian Cartel Offence should be less exacting than the mental element required by the civil penalty provisions that apply to exclusionary arrangements.

The distinction between intention, recklessness and knowledge of probability will not matter in easy cases. However, for cases close to the boundary between criminal and civil liability, the distinction may be critical.

THE ELEMENT OF AGREEMENT IN THE AUSTRALIAN CARTEL OFFENCE

The Criminalisation Proposals refer to the need for a ‘contract, arrangement or understanding’. The same concepts are used to define the civil penalty prohibitions against price fixing and exclusionary provisions in section 45 of the Trade Practices Act. Under section 188 of the Enterprise Act ‘an agreement’ is the corresponding although narrower concept.³⁴

The requirement of a contract, arrangement or understanding has been difficult to establish in civil penalty enforcement actions for price fixing and exclusionary arrangements under section 45 of the Trade Practices Act.³⁵ Recent cases in which the

³¹ In *Gerakiteys v The Queen* (1983) 153 CLR 317 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; see further Fisse B, *Howard's Criminal Law* (5th ed, 1990), 370-375.

³² Law Council of Australia, Submission to the Working Party on Penalties for Cartel Behaviour (12 December 2003), 10-11. That approach is consistent with the mental element of conspiracy under the Criminal Code (Cth), s 11.5.

³³ *Carlton & United Breweries (NSW) Pty Ltd v Bond Brewing NSW Ltd* (1987) ATPR [40-820] at [48,880]. Contrast the highly questionable interpretation in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (1990) 27 FCR 460 that the purpose of a provision could be anti-competitive where only one of the alleged parties had a subjective anti-competitive purpose; see the criticism in Robertson D, ‘The Primacy of Purpose in Competition Law – Pt 1’ (2001) 9 CCLJ 4 at [71]-[72]. By contrast, in *Seven Network Limited v News Limited* [2007] FCA 1062 at [2402] ff, 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 interpretations adopted in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* and *Seven Network Limited v News Limited* raise the difficulty of determining which parties are to be taken as being ‘responsible for including’ the relevant anti-competitive provision in an agreement. More fundamentally, they are difficult or impossible to reconcile with the penal nature of the prohibitions under section 45 of the Trade Practices Act and the canon of interpretation that ambiguity in a penal statute is to be resolved in favour of defendants.

³⁴ The offence of conspiracy under the Criminal Code (Cth) s 11.5 is also defined in terms of ‘agreement’.

³⁵ See Round D and Hanna L, ‘Curbing Collusion in Australia: The Role of Section 45A of the Trade Practices Act’ (2005) 29 MULR 270. See also *Bell Atlantic Corp v Twombly*, 550 US __, 127 S Ct 1955 (2007); and Kovacic

ACCC has failed to prove the existence of an arrangement or understanding have highlighted the difficulty. The enforcement actions in *Apco Service Stations Pty Ltd v ACCC*³⁶ and *ACCC v Leahy Petroleum Pty Ltd*³⁷ for price fixing failed partly because of the ruling that communication of prices between competitors did not amount to an arrangement or understanding under section 45 unless there is evidence of a commitment by at least one participant to fix prices following a discussion about a future price increase.³⁸

These decisions have been taken by some to suggest that the Australian Cartel Offence is likely to be a dead letter given the difficulty of proving the presence of a commitment beyond a reasonable doubt. That difficulty would be compounded if the presence of commitment must be proven against each of the alleged participants in an arrangement or understanding. This concern is tempered to some extent by the fact that the party making a price fixing overture may be liable for an attempt to enter into a price fixing arrangement.³⁹

The Criminalisation Proposals were published early in 2005 before the decision in *Apco Service Stations Pty Ltd v ACCC*. It is unknown whether the forthcoming legislation will redefine an 'arrangement' or an 'understanding' in such a way as to make it unnecessary for commitment, or moral obligation, to be proven where competitors discuss or otherwise communicate with each other about future prices and extend an invitation to fix those prices.⁴⁰ If the law is changed in this way, the change is likely to be limited to the civil penalty provisions under section 45 of the Trade Practices Act.

VALUE OF AFFECTED COMMERCE THRESHOLD FOR PROSECUTION OF THE AUSTRALIAN CARTEL OFFENCE

An MOU between the ACCC and the Commonwealth Director of Public Prosecutions (DPP) will be put in place to guide prosecutorial discretion and thereby help to limit the prosecution of the Australian Cartel Offence to serious cases.

The MOU is to include a guideline requiring the ACCC to consider whether or not the value of affected commerce exceeds \$1 million.

W, 'The Identification and Proof of Horizontal Agreements under the Antitrust Laws' (1993) (Spring) The Antitrust Bulletin 5.

³⁶ (2005) ATPR 42-078.

³⁷ [2007] FCA 794.

³⁸ See further Guirguis A & Evans C, 'Cartels, Cooperation and Circumstantial Evidence' (June 2007) available at <http://www.bdw.com.au>.

³⁹ *TPC v Parkfield Operations Pty Ltd* (1985) 7 CR 534. See further Round D and Hanna L, 'Curbing Collusion in Australia: The Role of Section 45A of the Trade Practices Act' (2005) 29 MULR 270, Section IVA. Compare the curious reasoning in *US v American Airlines, Inc*, 743 F2d 1114 (1984).

⁴⁰ See further Black O, *Conceptual Foundations of Antitrust* (2005) chs 4-6; Page W, 'Communication and Concerted Act' (2007) 38 Loyola University Chicago LR 405; Hay G, 'The Meaning of 'Agreement' under the Sherman Act: Thoughts from the 'Facilitating Practices' Experience' (2000) 16 Review of Industrial Organization 113.

This threshold appears to be based partly on the US Sentencing Guidelines under which the value of affected commerce is a significant variable for determining sentences imposed on corporate offenders.⁴¹ One purpose of specifying a percentage of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss.

The Press Release states that the value of affected commerce means ‘the combined value for all cartel participants of the specific line of commerce affected by the cartel’. This seems consistent with the interpretation of the ‘value of affected commerce’ sentencing factor under the US Sentencing Guidelines in *United States v Hayter Oil Co*,⁴² where the Sixth Circuit Court of Appeals held that:

the volume of commerce attributable to a particular defendant convicted of price-fixing includes all sales of the specific types of goods or services which were made by the defendant or his principal during the period of the conspiracy, without regard to whether individual sales were made at the target price.⁴³

The proposed \$1 million value of affected commerce threshold has been criticised on the ground that small cartels may have a severe impact in small geographic markets.⁴⁴

One possible solution would be to limit prosecutions to cases where the specific line of commerce likely to be affected by the cartel represents a minimum percentage (say 20%) or more of the value of sales by all competitors who compete in that specific line of commerce in the relevant geographic market during the period when the specific line of commerce is affected by the cartel or a specified period linked to the time of the alleged offence. In contrast, the proposed threshold of \$1 million value of affected commerce is over-inclusive as well as under-inclusive. It may also be noted that the approach suggested would go some distance toward meeting the concern of the Law Council of Australia in its Submission to the Working Party that a monetary threshold may not take account of the multiplier effect of a cartel affecting supply of an essential ingredient or component on very substantial downstream markets.⁴⁵

CORPORATE RESPONSIBILITY FOR THE AUSTRALIAN CARTEL OFFENCE

The Australian Cartel Offence, unlike the cartel offence under the Enterprise Act, would be subject to corporate and individual responsibility. This is entirely to be

⁴¹ *Federal Sentencing Guidelines Manual* (2004) ch 2. Consider also the definitional requirement in the money laundering offences under the Criminal Code (Cth) ss 400.3(1)(2) and (3) that the value of the relevant money or property be \$1 million or more. Curiously, the \$1 million value of affected commerce threshold in the Criminalisation Proposals is merely a guide to the exercise of prosecutorial discretion, not a definitional element of the Australian Cartel Offence.

⁴² 51 F.3d 1265 (1995).

⁴³ At 1273.

⁴⁴ Clarke, ‘Criminal Penalties for Contraventions of Part IV of the Trade Practices Act’ (2005) 10 Deakin LR 141 at 162.

⁴⁵ Law Council of Australia, Submission to the Working Party on Penalties for Cartel Behaviour, 12 December 2003, 8.

expected because corporate criminal responsibility is well entrenched in Australia and applies across a very broad range of legislation.⁴⁶

To Australian and US eyes, it is odd that the cartel offence under the Enterprise Act does not apply to corporations as well as to individual persons:

- The claim that individual criminal liability is sufficient seems heroic because it fails to take account of the difficulties of investigation and enforcement resources which largely explain the development of corporate criminal liability in the USA, Canada, Australia and many other countries.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
- 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 is unpersuasive. It fails to take account of the importance of the stigma flowing from the conviction of a company for an offence.⁴⁹ It also fails to consider the possibility of developing punitive non-monetary forms of sanctions against corporations.⁵⁰

The approach taken in the Enterprise Act appears to be based on the position that it is desirable to maintain consistency with the civil regime of prohibitions against

⁴⁶ See generally Clough J & Mulhern C, *The Prosecution of Corporations* (2002).

⁴⁷ See Fisse B & Braithwaite J, *Corporations, Crime and Accountability* (1993) 36-41. See also Harding C, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (2007) 149-150. The explanation given in 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. Nor is the issue of corporate criminal responsibility addressed adequately in eg Cseres KJ, Schinkel MD & Vogelaar FOW (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (2006). On corporate criminal responsibility in the UK, see Wells C, *Corporations and Criminal Responsibility* (2nd ed, 2001).

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

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

⁵⁰ See eg Australian Law Reform Commission, *Principled Regulation* (Report 95, 2002) ch 28; NSW Law Reform Commission, *Sentencing Corporate Offenders* (Report 102, 2003); Gruner R, *Corporate Crime and Sentencing* (1994) ch 12; Fisse B, 'Community Service as a Sanction against Corporations' [1982] Wis L Rev 970; Fisse B, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 S Cal L Rev 1145; Fisse B, 'The Punitive Injunction as a Sanction against Corporations' (unpublished working paper, 1993) <http://www.brentfisse.com>; Fisse B and Braithwaite J, *Corporations, Crime and Accountability* (1993) 42-43, 82-83; and Garrett B, 'Structural Reform Prosecution' (2007) 93 Va L Rev 853. The analysis in Wils WPJ, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics* (2002) is far from optimal because it does not discuss possible non-monetary sanctions against corporations or the extensive literature on that subject.

undertakings under EU competition law.⁵¹ However, the non-use of corporate criminal responsibility under the EU model is open to question.⁵²

The basis upon which a corporation is to be held responsible for the Australian Cartel Offence is not clear from the Criminalisation Proposals. The main possible options for the attribution of responsibility to corporations are:

- (1) vicarious responsibility parallel to vicarious liability under section 84 of the Trade Practices Act;
- (2) corporate responsibility under the Criminal Code (Cth) provisions on corporate criminal responsibility;⁵³
- (3) vicarious responsibility subject to a defence that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct, as under section 44ZZO and section 152EO of the Trade Practices Act.

Approach (1) follows section 84 of the Trade Practices Act, which has given the ACCC a low barrier to clear when seeking to establish liability for civil penalties and remedies. However, vicarious liability is a form of strict liability and is inconsistent with the general principle that criminal responsibility is personal, not vicarious, and requires fault.⁵⁴

Approach (2) follows the Criminal Code (Cth). The general principle of corporate responsibility under the Criminal Code (Cth) seeks to reflect the concept of corporate blameworthiness by requiring fault that is corporate in nature rather than merely fault on the part of 'a directing mind' under the principle in *Tesco Supermarkets Ltd v Natrass*.⁵⁵ The Criminal Code provisions depart from the *Tesco* principle in two main ways:

- The physical elements of an offence are attributable to a corporation on a much broader basis than under the directing mind principle. It is unnecessary to prove that a representative who is directing mind of the corporation engaged in the

⁵¹ Office of Fair Trading, *Proposed Criminalisation of Cartels in the UK* (OFT 365, 2001) at 1.19, 2.11.

⁵² See Harding C & Joshua J, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (2003) chs 9-10. The cartel offence in Ireland is subject to corporate as well as individual responsibility: *Competition Act 2002*, s 6; see generally Massey P, 'Criminal Sanctions for Competition Law: A Review of the Irish Experience' (2004) 1 Comp L Rev 23.

⁵³ Criminal Code (Cth) s 12. See further, Hill J, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' [2004] Jnl of Business Law 1; and, Woolf T, "The Criminal Code Act 1995 (Cth) – Towards a Realist Vision of Corporate Criminal Liability" (1997) 21 Crim LJ 257. Under s 6AA of the Trade Practices Act (Cth) the Criminal Code principles of responsibility are the default principles that apply to offences under the Act.

⁵⁴ See further Fisse B, *Howard's Criminal Law* (5th ed, 1990) 604.

⁵⁵ [1972] AC 153. On the weaknesses of the *Tesco* principle see Fisse B, *Howard's Criminal Law* (5th ed, 1990) 601-603. Compare the broader concept of attribution of liability adopted by the Privy Council in the civil case of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918. The *Meridian* approach is ill-defined and ill-related to the concept of corporate fault; see Clarkson, CMV, 'Kicking Corporate Bodies and Damning their Souls' (1996) 59 MLR 557 at 565-569.

relevant conduct. It is sufficient that the conduct is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority (section 12.2).

- The mental element of an offence is attributable to a corporation on a different basis than under the directing mind principle. Under section 12.3(1), if intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element is attributable to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence. Section 12.3(2) provides that this corporate fault element can be established by:
 - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
 - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

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

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

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

- Rare will be the case where a board gets involved in cartel conduct or fails to have boilerplate precautions in place to thwart attempts to sheet home criminal responsibility.
- The concept of a 'high managerial agent' is ill-defined⁵⁶ but goes further than the *Tesco* precept of 'a directing mind'. Even so, cartel offences are often likely to be

⁵⁶ Under s 12.3(6) '*high managerial agent* means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy'. Contrast the avoidance of this concept in the statutory model set out in Fisse B, 'The Attribution of Criminal Liability to Corporations' (1991) 13 Sydney Law Review 277.

perpetrated on the front lines of middle management rather than in the much more remote command posts of high managers.

- The concept of a ‘corporate culture’ does project the animating idea of corporate blameworthiness. However, the concept has yet to be tested and appears to require proof of conditions and attitudes within an organisation that go considerably beyond merely proving that the managers immediately involved in the cartel conduct acted with criminal intent. Moreover, expert sociological evidence would seem relevant to prove or disprove the existence of a corporate culture. Given that usually there are many diverse cultures within a corporation, the concept of some homogenous corporate culture is probably unworkable.⁵⁷

The classic heavy electrical price fixing conspiracies in the USA in the late 1950s and early 1960s⁵⁸ lead one to ask: would the prosecutions against GE, Westinghouse and the other larger transformer companies have succeeded if the US DOJ had been required to establish liability under the Criminal Code provisions for corporate criminal responsibility? Considerable difficulty would have been encountered given that the companies assiduously blamed middle management for breaching the antitrust compliance policy that each company had in place. In particular, the companies would have answered, not without some degree of credibility, that no high managerial agent was implicated in the price fixing, and that their antitrust compliance policies and programs indicated that they had exercised due diligence and did not have a corporate culture given to price fixing.

The prosecution would face much less of a hurdle if, as under approach (3), vicarious responsibility is imposed subject to a defence that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct. This is the pragmatic approach adopted in section 44ZZO and section 152EO of the Trade Practices Act and in provisions governing corporate responsibility in numerous Acts of the Commonwealth of Australia.

One feature of this approach is that it focuses on the standard of reasonable precautions and due diligence expected of a corporation engaged in the same kind of commerce – the standard is not based merely the standard of any given individual within the company.⁵⁹

DEFENCES TO AND EXEMPTIONS FROM THE AUSTRALIAN CARTEL OFFENCE

The Criminalisation Proposals state that Australian Cartel Offence will not apply to conduct that is lawful by reason of a defence or exemption under the Trade Practices Act. For example, it is possible to seek an authorisation from the ACCC for conduct that would otherwise amount to price fixing and, if granted, such an authorisation

⁵⁷ See further Smircich L, ‘Concepts of Culture and Organizational Analysis’ (1983) 28 *Administrative Science Quarterly* 339.

⁵⁸ See Smith RA, *Corporations In Crisis* (1966) chs 5-6.

⁵⁹ Fisse B, ‘The Attribution of Criminal Liability to Corporations’ (1991) 13 *Sydney Law Review* 277 at 292.

would provide an exemption from criminal as well as civil liability.⁶⁰ Other exemptions include those for certain export cartels and intellectual property licensing conditions.⁶¹ The main defence is the joint venture defence that became available on 1 January 2007.

By contrast, the cartel offence under the Enterprise Act is not defined in terms of conduct without lawful authority or excuse. The requirement of dishonesty is the avenue whereby accused with an excuse or justification for their conduct may obtain an acquittal.

At a political level, there would be a public outcry from business in Australia if defences and exemptions available in civil penalty cases were not also available in criminal cases. In terms of policy, the Government has not accepted the explanation given for relying on the concept of dishonesty in section 188 of the Enterprise Act instead of allowing an accused to plead an exemption or defence available in civil proceedings.

The Office of Fair Trading Report, *Proposed Criminalisation of Cartels in the UK* (2001) saw dishonesty as a way of preventing accused from arguing in a jury trial that they had not committed a breach of United Kingdom or European Union competition laws because, for example, the conduct was subject to an exemption.⁶² That approach lacks credibility:

- The element of dishonesty would not prevent an accused from arguing that conduct in compliance with a civil per se prohibition was not dishonest according to the standards of ordinary people. Here the Report is at odds with the statement in paragraph 7.31 of the DTI White Paper, *A World Class Competition Regime* that: ‘A defendant could use as his defence the claim that he honestly believed he was acting in accordance with Art 81 or Ch I.’⁶³
- Even in the case of conduct yet to be exempted but which the defendant believed to be likely to become exempted, the element of dishonesty would not prevent an accused from arguing that he or she did not know that the conduct was dishonest according to the standards of ordinary people. Indeed, the subjective limb of the element of dishonesty gives accused much more latitude to deny liability than is the case where liability depends on the legal definition of defences and exemptions. For example, the subjective limb of the *Ghosh*⁶⁴ test of dishonesty opens the way for accused to rely, in effect, on ignorance or mistake of law as a defence.
- 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 to be resolved is whether any such defence should be limited to

⁶⁰ Note also that even if an authorisation has not been sought an accused may be able to deny the element of dishonesty on the basis that, if sought, authorisation would be likely to be granted.

⁶¹ Trade Practices Act (Cth) s 51(2)(g), s 51(3).

⁶² OFT Report 365, at 2.5, 2.6.

⁶³ Cm 5233, July 2001.

⁶⁴ [1982] 2 All ER 689.

a cartel offence rather than being made a general defence in the criminal law. 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.

The joint venture defence under sections 76C and 76D of the Trade Practices Act gives competitors a way of structuring their conduct so as to be able to rely on a competition test instead of being exposed to a *per se* criminal prohibition and the uncertainties of the element of dishonesty in the Australian Cartel Offence. It is a defence to establish that a price fixing or exclusionary provision: (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. Sham joint ventures, such as arranged marriages of convenience between competitors who suddenly decide to pitch for a tender as a joint venture, will not provide a defence.⁶⁵ However, it will be relatively easy for competitors to create a 'joint venture' that involves sufficient integration and efficiencies to avoid being regarded as a sham.⁶⁶ If so, they will be able to invoke a competition test at trial, whether in criminal proceedings or in enforcement actions for civil penalties.

SENTENCING OPTIONS AND MAXIMUM PENALTIES FOR THE AUSTRALIAN CARTEL OFFENCE

The sentencing options and maximum penalties heralded by the Criminalisation Proposals raise numerous policy questions. The maximum jail term of 5 years is lower than that for the Criminal Code offences of obtaining property by deception (section 131.1 – 10 years) and conspiracy to defraud a Commonwealth entity (section 141.1 – 10 years). The general offence under section 135 of acting with intent to dishonestly obtain a gain carries a maximum jail term of 5 years but that offence does not require serious cartel conduct and applies to a wide range of conduct of lesser gravity than serious cartel conduct. The maximum term proposed for the Cartel Offence is also difficult to reconcile with the rhetoric of politicians and others that serious cartel conduct is akin to theft, fraud or extortion.

The maximum fine for individuals is to be \$220,000 whereas the maximum civil penalty for price fixing and exclusionary arrangements is now \$500,000. This disparity is unexplained and is curious. There is no maximum limit on the fine that can be imposed under section 190 of the Enterprise Act. Few would doubt that the stigma flowing from conviction is high because the offence is subject to the possibility of a jail sentence. However, that consideration does not explain why, in cases where jail is not

⁶⁵ See further Tyson N, 'Joint Venture Regulation under Australian Competition Regulation' (2006) 34 ABLR 211 at 215-216.

⁶⁶ See Werden, 'Antitrust Analysis of Joint Ventures' (1998) 66 Antitrust LJ 701.

considered by a court to be an appropriate sentence, the maximum fine should be lower than the maximum civil penalty for the same or very similar conduct.

The maximum jail term of 5 years has implications for the powers of investigation that may be used to investigate serious cartel conduct. One implication is that it will not be possible to obtain a telecommunications interception warrant under the Telecommunications (Interception and Access) Act 1979 which applies only in relation to serious offences (offences carrying a 7 year maximum jail term). However, presumably a surveillance device warrant under section 14 of the Surveillance Devices Act 2004 (Cth) could be obtained for the use of electronic surveillance methods other than telecommunications interception (eg participant monitoring). However, it would be necessary to comply with State and Territorial legislation regulating the use of listening and other surveillance devices; the Criminalisation Proposals do not explain what mechanisms should be adopted in order to achieve compliance. It has not been explained in the Criminalisation Proposals or elsewhere why, unlike the position in the USA, Canada and the UK, the power to intercept telecommunications should not be available.⁶⁷ The power to use electronic surveillance should be addressed squarely, as it has been in the UK.⁶⁸ Otherwise the ACCC might find itself tempted to gear investigations to more serious offences, such as conspiracy to defraud a Commonwealth entity⁶⁹ or money-laundering,⁷⁰ which qualify for the use of telecommunications interception.

The criminal sanctions to be available against corporations are: (a) fines that parallel civil penalties; and (b) adverse publicity orders.⁷¹ Non-punitive orders of probation or community service will also be available.⁷² There is no sanction comparable in severity of impact to jail. Any direct analogue of jail would be absurd as a corporate sanction given the drastic spillover effects that incapacitation would have on employees, shareholders and the general community.⁷³ However, there are other possible sanctions that could avoid untoward spillover effects and yet internalise within corporations the unwanted nature of serious cartel conduct in a way that fines are incapable of doing. Various possible combinations of adverse publicity orders, corporate probation and community service orders could be used by a court when sentencing to make the point

⁶⁷ See Racanelli M, 'Bugs in the Boardroom?' (2006) (January) ABA Antitrust Source 1; Canada, Bureau of Competition, Information Bulletin, *Interception of Private Communications and the Competition Act* (1999); Furse M & Nash S, *The Cartel Offence* (2004), 57-60.

⁶⁸ See eg OFT, Code of Practice, August 2004, *Covert Surveillance in Cartel Investigations*; OFT, Code of Practice, August 2004, *Covert Human Intelligence Sources in Cartel Investigations*.

⁶⁹ Criminal Code (Cth) s 141.1.

⁷⁰ Criminal Code (Cth) s 400.3.

⁷¹ Trade Practices Act 1974 (Cth), s 86D.

⁷² Trade Practices Act 1974 (Cth), s 86C. See further NSW Law Reform Commission, *Sentencing Corporate Offenders* (Report 102, 2003); Gruner R, *Corporate Crime and Sentencing* (1994), ch 12; Fisse B, 'Community Service as a Sanction against Corporations' [1982] Wis L Rev 970.

⁷³ See Fisse B, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 S Cal L Rev 1145.

that serious cartel conduct is a serious offence and not merely some kind of activity that needs to be priced and accounted for in the financial statements of a corporation.⁷⁴ The Criminalisation Proposals are set out merely in the Press Release and do not deal in any helpful way with the challenge of punishing corporate offenders in ways that fit the new crime.

The Criminalisation Proposals indicate that the Proceeds of Crime Act 2002 (Cth) will apply to the Australian Cartel Offence. However, they do not stay to examine the practical implications of this development. The particular implications in the context of cartel conduct were not examined by the Australian Law Reform Commission in its extensive review of this subject in 1999.⁷⁵ The Proceeds of Crime Act provides for far-reaching restraining orders, forfeiture orders and penalty orders. Working out how those provisions will apply in the context of serious cartel conduct is a non-trivial task that may unravel unintended results and unjustified exposures to the risk of double punishment.

Consideration also needs to be given to the implications of the wide array of offences against money laundering in the Criminal Code (Cth). These offences are very widely defined, will often apply to the conduct proscribed by the Australian Cartel Offence, and carry high maximum jail terms. For example, the offence under section 400.3(1) of the Criminal Code proscribes dealing with money or other property where the money or property is believed to be proceeds of crime and the money or property has a value of \$1 million or more at the time of the dealing; the maximum jail term for this offence is 25 years. Assume that the Australian Cartel Offence has come into effect. Assume further that ACO and BCO are competitors and bid for two infrastructure projects. The bids are rigged by individuals on the tender so that ACO is likely to win the first project and BCO is likely to win the second. Under the contracts for these projects an initial payment of \$2 million is payable upon start of work. This money is derived or realised from the commission of an indictable offence and hence amounts to 'proceeds of crime' as that term is defined in section 400.1. Employees within each company may 'deal with' the \$2 million payment in one or more of the ways specified in the definition of this term in section 400.2. They may also have a belief that the \$2 million payment they deal with is derived from the commission of an indictable offence. If so, they will commit the offence of dealing in proceeds of crime under section 400.3(1) and be subject to a maximum jail term of 25 years.⁷⁶ The Criminalisation Proposals do not indicate what, if any, limitations or prosecutorial guidelines will govern the operation of the money laundering offences in the context of serious cartel conduct.

⁷⁴ Consider, for example, the reaction of BA in the recent fuel surcharges price fixing case - BA had set aside £350 million 'as a provision' for possible fines: Australian Financial Review, 2 August 2007, 16.

⁷⁵ Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* (Report 87, 1999).

⁷⁶ Other money laundering offences may also be relevant including the offence under section 400.3(2) which carries a maximum jail term of 12 years.

OTHER QUESTIONS RAISED BY THE AUSTRALIAN CRIMINALISATION PROPOSALS

The Criminalisation Proposals raise many other questions. To begin with, the title ‘cartel offence’ is beige and seems comparable to calling theft or fraud ‘unlawful acquisition of property’. More apposite and suitably pungent possibilities include ‘conspiracy to subvert competition’.⁷⁷

The relevant types of serious cartel conduct need to be defined in terms that can readily be communicated to juries.⁷⁸ There is no reason for optimism that this challenge will be met. The definitions of cartel conduct in sections 188 and 189 of the Enterprise Act are prolix. The definitions of price fixing and exclusionary provisions in sections 45, 45A and 4D of the Trade Practices Act defy quick comprehension, even by persons accustomed to Australia’s baroque school of trade practices legislative drafting.

There are to be supposedly separate criminal and civil tracks of investigation. The ACCC now relies heavily on the broad powers of investigation under section 155 of the Trade Practices Act and the extent to which the new criminal powers of investigation are narrower than those under section 155 remains unknown. The main potential practical problem is that the decision whether or not to proceed with a criminal rather than civil investigation may depend on information and evidence that criminal powers of investigation may not necessarily provide. Partly for this reason, it is surprising that: (a) the Criminalisation Proposals do not say anything about telecommunications interception or participant monitoring by means of electronic surveillance devices; and (b) the Proposals seem to preclude the use of telecommunications interception to investigate the Australian Cartel Offence.

The Commonwealth Director of Public Prosecutions is to prepare an immunity policy for the Australian Cartel Offence. From the standpoint of offenders, the efficacy of immunity arrangements will much depend on whether or not the ACCC and the DPP will offer a ‘one-stop’ procedure for the receipt and assessment of applications for immunity from both criminal and civil penalty proceedings. The Criminalisation Proposals do not indicate whether or not there is to be any such one-stop process.

The relationship between criminal and civil proceedings needs to be managed.⁷⁹ The Criminalisation Proposals state:

The existence of parallel civil and criminal provisions for potentially the same conduct could give rise to issues concerning the order in which matters are litigated

⁷⁷ See Fisse (2007) 35 ABLR 235 at 276.

⁷⁸ Note the very different meanings that can be given to terms such as ‘bid rigging’; see *US v Heffernan*, 43 F3d 1144 (1994).

⁷⁹ Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) 156-157; Australian Law Reform Commission, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation* (Report 95, 2002), ch 11; Australian Law Reform Commission, *Compliance with the Trade Practices Act* (Report 68, 1994) ch 9; Nazzini R, *Concurrent Proceedings in Competition law: Procedure, Evidence and Remedies*, Oxford, OUP, 2004.

and the appeals process. Therefore, statutory bars will be incorporated in the Trade Practices Act to provide appropriate protection, for example, to stay civil proceedings until criminal proceedings are completed, after which time, if the defendant is convicted, the civil proceedings would be terminated.

This proposal does not deal with the situation where criminal proceedings are brought against employees of a company and where civil penalty proceedings are brought concurrently against the company. Nor does the proposal deal with the question of when civil actions for damages against a company should be stayed because the alleged conduct is also the subject of criminal proceedings.

Will the offence of conspiracy apply to the Australian Cartel Offence? The offence of conspiracy applies to the cartel offence under the Enterprise Act. However, the cartel offence is itself an offence defined in terms of an agreement between parties and is closely akin to a conspiracy.⁸⁰ The notion of a conspiracy to commit a conspiracy is infinitely regressive and alien to the common law.

One problem with creating a cartel offence instead of relying on the offence of conspiracy (eg by extending the offence to include a conspiracy to subvert competition) is that desirable limitations on the scope of liability for conspiracy may be passed over. For example, the offence of conspiracy under the Criminal Code (Cth) is subject to a defence of withdrawal.⁸¹ Will withdrawal be a defence to the Australian Cartel Offence?

Large and well-advised companies may have the tactical sense and ability to adapt to the resulting cartel laws in various ways, as by means of mergers, greater use of joint venture arrangements, and proactive steps (eg timely legal advice) calculated to place the company and its employees in a good position to deny that they have acted dishonestly.⁸² Query whether small companies will be in anywhere near the same position of strength if and when they take sight of the Australian Cartel Offence and the proceeds of crime and money-laundering destroyers that go with it.

THE PROCESS OF CARTEL CRIMINALISATION IN AUSTRALIA

The process of cartel criminalisation in Australia has been marked by delay, lack of transparency and uncertainty. There is still no detailed publicly available report that addresses the questions raised in the overview and critique above. The refusal of the Government to release the 2004 report of the Working Party is remarkable and increases the suspicion that the report is unconvincing or, if convincing, difficult to

⁸⁰ The offence of conspiracy was not used as basis for the cartel offence under the Enterprise Act because of the perceived difficulty in making price fixing and other forms for serious cartel conduct the object of conspiracy when such conduct was not itself a criminal offence. The logic is superficially attractive but results in the perverse result of creating the offence of conspiracy to commit what is similar to a conspiracy to defraud.

⁸¹ Criminal Code (Cth) s 11.5(5).

⁸² See Fisse (2007) 35 ABLR 235 at 263-265.

manage politically.⁸³ The legislation heralded by the Government over two and a half years ago remains vapourware. This unsatisfactory process stems partly from the failure of the Government initially to entrust the project to the Australian Law Reform Commission, an agency with a strong track record of producing detailed reports, coupled with commitment to public consultation.⁸⁴ Another likely explanation is political diffidence about treating cartel conduct as an offence and close identification with business people who would be subject to the application of the offence.⁸⁵

It is to be hoped that an exposure draft bill will be published for comment well before the cartel criminalisation legislation is introduced into Parliament but there is no sign as yet that any such draft will be provided.

⁸³ The author has made a freedom of information application for access to the Working Party's report; see n 3 above.

⁸⁴ See eg Australian Law Reform Commission, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation* (Report 95, 2002), ch 11; Australian Law Reform Commission, *Compliance with the Trade Practices Act* (Report 68, 1994) ch 9; Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* (Report 87, 1999).

⁸⁵ For an account of the politics surrounding the Dawson Committee's review of the ACCC's proposals for the criminalisation of cartel conduct, see Brenchley F, *Allan Fels: A Portrait of Power* (2003) ch 12. On the sociological background to the use of the criminal law against restrictive trade practices in Australia, see Hopkins A, *Crime, Law & Business: The Sociological Sources of Australian Monopoly Law* (1978) 116-120.