THE CONTRACT REQUIREMENT FOR THE JOINT VENTURE EXCEPTIONS UNDER SECTIONS 44ZZRO AND 44ZZRP OF THE TRADE PRACTICES ACT

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1. THE CONTRACT REQUIREMENT FOR THE PROPOSED JOINT VENTURE EXCEPTIONS

The joint venture exceptions under ss 44ZZRO and 44ZZRP of the Trade Practices Act, as recently amended, require that the cartel provision be contained in a *contract*, as distinct from an arrangement or understanding, except in the limited circumstances specified in s 44ZZRO(1A)(1B) and s 44ZZRP(1A)(1B) (the 'contract proxy provisions'). This is unsatisfactory for the reasons given in section 2 below.

The joint venture exceptions exclude the application of ss 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK 'in relation to a contract containing a cartel provision' if 'the cartel provision' is 'for the purposes of a joint venture' and certain other conditions are met, including the need for the cartel provision to be 'for the purposes of a joint venture'.

The contract proxy provisions were included in amendments to the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 in May 2009. The amendments were made in an attempt to respond to the extensive criticism made of the requirement of a contract for the jv exceptions.[1]

The contract proxy provisions in s 44ZZRO(1A) provide as follows:

> (1A) Section 44ZZRF does not apply in relation to an arrangement or understanding containing a cartel provision if:

Thanks are due to several colleagues, especially Caron Beaton-Wells for their comments on an earlier draft. The standard disclaimers apply.

[1] 'Cartel changes 'miss point'' AFR, 14 May 2009, p 4. For criticisms of ss 44ZZRO and 44ZZRP, see the submissions made to the Senate Economics Committee Inquiry into the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, at http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sublist.htm

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(a) the arrangement or understanding is not a contract; and

(b) when the arrangement was made, or the understanding was arrived at, each party to the arrangement or understanding:

  (i) intended the arrangement or understanding to be a contract; and

  (ii) reasonably believed that the arrangement or understanding was a contract; and

(c) the cartel provision is for the purposes of a joint venture; and

(d) the joint venture is for the production and/or supply of goods or services; and

(e) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the arrangement or understanding; and

(f) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (d) jointly by means of:

  (i) their joint control; or

  (ii) their ownership of shares in the capital;

  of that body corporate.

[Notes not included]

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Parallel provisions apply in relation to the offence of giving effect to a cartel provision (s 44ZZRO(1B)), the civil prohibition under s 44ZZRJ (s 44ZZRP(1A)) and the civil prohibition under s 44ZZRK (s 44ZZRP(1B)).[2]

By contrast, the existing joint venture defences under s 76C and 76D apply respectively to exclusionary provisions and price fixing provisions whether they are contained in a contract or an arrangement or understanding.[3]

Significant practical problems arise from the requirement that a cartel provision be contained in a contract or a proxy for a contract:

- The requirement that a cartel provision be in a contract operates retrospectively. This retrospectivity makes compliance difficult and costly. See section 2.1.

- The requirement for the joint venture exceptions under s 44ZZRO and s 44ZZRP that the cartel provision be in a contract is impractical. See section 2.2.

- The contract proxy provisions in s 44ZZRO(1A)(1B) and s 44ZZRP(1A)(1B) do not make allowance for a non-contractual cartel provision contained in a pre-contractual joint venture arrangement or understanding even where that cartel provision is later incorporated in the joint venture contract contemplated by the parties. See section 2.3.

- The contract proxy provisions require that *each party* to the arrangement or understanding intended the arrangement or understanding to be in a contract and reasonably believed that the arrangement or understanding was in a contract. This requirement is unprincipled and excessively onerous. See section 2.4.

- Where the party to an arrangement or understanding is a corporation, it is uncertain whose intention or belief is relevant when applying the contract proxy provisions. See section 2.5.

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[2] The drafting is prolix, to the extent of self-parody.
[3] The defence under s 76D has been repealed, along with s 45A.

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- The requirement that a cartel provision be in a contract is an inept legislative attempt to prevent the use of sham joint ventures as an avenue for evading the per se prohibitions against cartel conduct. The problem of 'JV Ultra-Lights', the most insidious type of sham joint venture in modern commerce, has yet to be addressed squarely in Australia. See section 2.6.

- The possibility of seeking authorisation by the ACCC does not resolve the above problems. See section 2.7.

2. WHY THE CONTRACT REQUIREMENT AND THE CONTRACT PROXY PROVISIONS FOR THE JOINT VENTURE EXCEPTIONS ARE UNSATISFACTORY

2.1 Retrospective application

The cartel offence of giving effect to a cartel provision and the civil prohibition against giving effect to a cartel provision apply to cartel provisions contained in joint venture arrangements or understandings that were created before the commencement of the cartel legislation (see s 44ZZRG(4) and s 44ZZRK(2)). The cartel legislation thus operates retrospectively in this respect.[4] This retrospective operation creates exposure to criminal and civil liability for those who have relied on the joint venture defences under s 76C and s 76D and have not had any reason to make sure that any exclusionary provision or price fixing provision was contained in a contract. Unlike the joint venture exceptions in ss 44ZZRO and s 44ZZRP, the joint venture defences under s 76C and s 76D do not require an exclusionary provision or a price fixing provision to be contractual.

More thoughtful lawmakers would have limited the requirement of a contract to cartel provisions created after the time of commencement of the new joint venture exceptions.[5] Are joint venture parties expected to undertake a due diligence inquiry to try to discover if there are earlier informal arrangements or understandings that contain a cartel provision? Any such due diligence inquiry would be costly and would not necessarily uncover all instances of non-contractual cartel provisions. Those involved in joint venture activities therefore have little practice choice but to run the risk of giving effect to non-contractual cartel provisions created before the cartel legislation commenced. This risk can be reduced but will not be eliminated by revising trade practices compliance manuals or guides in ways that guard against being caught by the retrospective operation of ss 44ZO and 44ZRP. Advisable

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[4] Contrast Australia, Minister for Justice and Customs, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (December 2007) 12-13.

[5] The transitional provisions in TPA, Part XIII do not so provide..

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precautions include a standard 'flame-arrester' joint venture operating procedure under which any discussion of non-compete, pricing and other specified sensitive topics is handled at a control point where any potential cartel provision is to be inserted routinely into a standard '44ZZRO/44ZZRP' contract as a contract variation.

The more fundamental question is why there is any need to limit a joint venture exception to cartel provisions that are contained in a contract. As discussed in section 2.6 below, the requirement of a contract lacks a cogent rationale.

2.2 Impracticality of the requirement that a cartel provision be contained in a contract

The contract requirement for the joint venture exceptions under s 44ZZRO and s 44ZZRP is impractical.

2.2.1 Umbrella joint venture contracts – the explanation given in the Supplementary Explanatory Memorandum is misleading

The implementation of a joint venture between parties who would otherwise be competitors often requires the discussion and application of cartel provisions contained in a joint venture contract. A joint venture contract typically delegates operating functions to an operating committee or operator/manager.[6] For example, there may be a general provision for the joint selling of a product produced by the joint venture, with the determination of price or non-price terms and conditions of sale for each particular sale delegated to a marketing committee on which each joint venture party is represented.[7] The general provision is a cartel provision contained in the joint venture contract. Each provision as to the price or non-price terms and conditions of sale for each particular sale is another cartel provision.[8] Each of those particular cartel provisions is not 'contained in' the joint venture contract in the ordinary

6 This follows from the interpretation of 'provision' in *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321 at [31]-[32].

7 See eg the North West Shelf Joint Venture joint selling arrangements authorised in ACCC, Authorisation A18492, 15 February 1977, para 27; ACCC, Determination, Application for Authorisation, North West Shelf Project, Authorisation A90624, 28 July 1998, section 1. These joint selling arrangements are longer authorised; query whether or not they are excepted by ss 44ZZRO and 44ZZRP. See also the joint selling arrangements authorised in relation to a greenfield project in ACCC, Determination for authorisation in respect of the PNG Gas Project, Authorisation A40081, 3 May 2006, para 2.1; and those sought to be authorised for the Gorgon Gas Project, Submission to the Australian Competition and Consumer Commission in support of Application for Interim and Final Authorisation, 20 May 2009, para 3.1. See generally S Fisher, 'Formation and Structure' in WD Duncan (ed), *Joint Ventures Law in Australia* (2005), ch 4, section 4.4; JD Merralls, 'Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts' (1988) 62 ALJ 907, section 3.

8 This follows from the interpretation of 'provision' in *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) FCR 321 at [31]-[32].

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sense of the words 'contained in' but is created by and contained in the particular arrangement or understanding agreed upon by the marketing committee. Orthodox analysis of the concept of a 'provision' and the concepts of 'arrangement' or 'understanding' under the TPA does not proceed on the basis of a general grouping of provisions or arrangements or understandings[9] but looks closely at the relevant facts to determine the existence of each and every particular 'provision' and each and every particular 'arrangement' or 'understanding'.[10] On that analysis, the joint venture exceptions under s 44ZZRO and s 44ZZRP do not apply to the particular cartel provisions decided upon by the marketing committee because those cartel provisions are not contained in a contract: they are contained in operational arrangements made by the marketing committee. If so, the joint venture exceptions are narrow and impractical.

The Supplementary Explanatory Memorandum issued in May 2009 offers the following explanation of the position where there is an underlying or umbrella joint venture contract:[11]

> In certain circumstances a joint venture may be concerned that day-to-day decisions made by a management board, comprising representatives of members of the joint venture, may be found to be arrangements or understandings which contain cartel provisions that do not have the benefit of the joint venture exceptions. In those circumstances, the joint venture parties would need to consider carefully whether the activities in relation to which they are concerned are cartel provisions according to

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[9] Contrast the aggregation provisions under TPA s 45(4)(b) and s 44ZZRD (8)(9). These aggregation provisions presuppose the need to identify each particular relevant provision in a contract, arrangement or understanding; they enable liability to be imposed on the basis of *either* a particular provision *or* a particular provision the effect of which is assessed by taking into account the effect of other relevant particular provisions. The TPA provisions are very different from the cartel provisions in the USA and the EC; contrast: (a) the concept of a continuing conspiracy under s 1 of the *Sherman Act* (see eg, *Grunewald v. United States*, 353 US 391, 396-97 (1957); *US v Continental Group, Inc*, 603 F 2d 444 (1979); *United States v Eisen*, 974 F 2d 246, 269 (2d Cir 1992)); and (b) the doctrine of single continuous infringement under Art 81 of the EC Treaty (see J Faull & A Nikpay, *The EC Law of Competition* (2nd ed 2007) 198-201).

[10] See *Visy Paper Pty Ltd v ACCC* (2003) 216 CLR 1 at [22]-[35] per Gleeson CJ, McHugh, Gummow & Hayne JJ. Contrast *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Limited* [2008] FCAFC 60 (arrangements may be aggregated for the purpose of determining the price limit in TPA s 51AC in some very limited circumstances where eg, there are collateral contracts). The wording and purpose of the price limit in s 51AC is very different from the wording and purpose of the cartel offences and the prohibition against exclusionary provisions. Any notion that collateral contracts or collateral provisions are to treated exclusively as a single composite contract or arrangement, or that collateral provisions are to be treated exclusively as a single composite provision, would be flatly inconsistent with the approach of the High Court to the interpretation of s 45 that governed the decision in *Visy Paper Pty Ltd v ACCC* (2003) 216 CLR 1 (see eg at [33]: 'the one verbal composite may contain stipulations each of which is a "provision" in the statutory sense, and with different statutory characteristics').

[11] See also the legally mistaken views expressed in Senate, Standing Committee on Economics, *Inquiry into the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008,* at paras 3.30-3.35, at http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/index.htm

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> the definition under section 44ZZRD, and if so, whether the particular activity is contemplated and regulated by an underlying joint venture contract. If a board or committee is established under the joint venture contract to regulate or manage the joint venture and the activities of that board or committee are contemplated and regulated by the joint venture contract, then the exceptions would appear to apply in relation to those activities. (para 1.12)

An example is given in the Supplementary Explanatory Memorandum to illustrate what is meant:

> Two or more parties enter into a joint venture to own or develop a shopping centre, and have a contract containing clauses to the effect that a management committee comprising representatives of the joint venture parties will decide from time to time the rent and other charges within their shopping centre, and then later proceed to do so. If the original contract that was made has a provision providing for the making of decisions as to rent and other charges by that management committee for the purposes of the joint venture, then the process of making and giving effect to those decisions would appear to be covered by the exception. (example 1.4)

The explanation and the example given in the Supplementary Explanatory Memorandum do not explain exactly why it is thought that the joint venture exceptions would appear to apply. Nor do they consider why the exceptions might not apply. There are several major difficulties.

First, a particular cartel provision created in a later arrangement or understanding may be 'contemplated and regulated by' a prior underlying joint venture contract without being 'contained in' that prior underlying joint venture contract.[12] As a matter of ordinary usage, 'contain' means 'to comprise; to have in it'.[13] A particular cartel provision created in a later arrangement or understanding is contained in that arrangement or understanding. Such a provision may be 'related to' the implementation of an underlying joint venture contract but that is not how the exceptions under ss 44ZZRO and 44ZZRP are defined.

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[12] See further S Mouzas & M Furmston, 'From Contract to Umbrella Agreement' (2008) 67 Cambridge LJ 37.

[13] *Shorter Oxford Dictionary* ('Contain' means: 'To comprise; to have in it'). Compare *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 (applying the term 'contained in' in an arbitration clause without the need to explicate the meaning of the term).

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Secondly, even if a particular cartel provision created in a later arrangement or understanding can be characterised as being 'contained in' a prior underlying joint venture contract, it is nonetheless a cartel provision contained in that later arrangement or understanding. A cartel provision contained in a non-contractual arrangement or understanding does not qualify for a joint venture exception under s 44ZZRO or s 44ZZRP (except to the very limited extent allowed under the contract proxy provisions in ss 44ZZRO(1A)(1B) and 44ZZRP(1A)(1B)).

Thirdly, whether there are 'activities' regulated by an underlying joint venture seems beside the point. If the implementation of a joint venture gives rise to a cartel provision in a non-contractual arrangement or understanding, that provision does not qualify for the joint venture exceptions under ss 44ZZRO and 44ZZRP; as noted above, the statutory language does not say that the exceptions apply to a provision that is merely 'related to' the implementation of an underlying joint venture contract. Non-contractual cartel provisions may easily arise during the implementation of a joint venture between competitors. The concept of a 'provision' is not limited to a contractual provision or a provision that has a contractual connotation. As the High Court explained in *Visy Paper Pty Ltd v ACCC*:[14]

> The word 'provision' is used here and elsewhere in Pt IV in a comprehensive rather than any technical sense reflecting its usage in contract law. It invites attention to the content of what has been, or is to be, agreed, arranged or understood, rather than any particular form of expression of that content adopted, or to be adopted, by the parties. This is emphasised by the statement in s 4(1) that 'in relation to an understanding' provision means 'any matter forming part of the understanding'.

There is also the problem that umbrella agreements may not necessarily be contracts: 'Agreements to agree' are not contracts.[15] Extreme care is needed when drafting umbrella agreements to ensure that there is a valid contract.[16] A cartel provision contained in an umbrella agreement that is not a contract obviously will not be a cartel provision 'contained in a contract'. A belief that such a provision is contained in a contract, no matter how reasonable that belief might possibly be, will be a mistake of law.[17] Mistake of law will

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[14] (2003) 216 CLR 1 at [7] per Gleeson CJ, McHugh, Gummow & Hayne JJ.

[15] *May and Butcher Ltd v R* (1929) [1934] 2 KB 17; *Masters v Cameron* (1954) 91 CLR 353.

[16] See eg, *Godecke v Kirwan* (1973) 129 CLR 629); *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600. See further M Howard, 'Terms to be Supplied by a Contracting Party' (1982) 56 *ALJ* 77; S Mouzas & M Furmston, 'From Contract to Umbrella Agreement' (2008) 67 Cambridge LJ 37.

[17] Ignorance or mistake of law is no excuse; see *Criminal Code* (Cth) s 9.3; *Ostrowski v Palmer* (2004) 218 CLR 493, [1]-[4] (Gleeson CJ and Kirby J).

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defeat attempted reliance on the contract proxy provisions in s 44ZZRO(1A)(1B) and s 44ZZRP(1A)(1B).

What will the courts make of the explanation given in the Supplementary Explanatory Memorandum? The Supplementary Explanatory Memorandum does not give a clear indication of legislative intention. It states merely that the type of situation discussed 'would appear to be covered' by the joint venture exceptions. It does not say that the joint venture provisions are to be interpreted as over-riding the accepted meaning of the concepts of 'provision' and 'arrangement' or 'understanding'. The resulting obscurity will be a source of frustration for corporations, advisers and the courts. This is especially so given that the obscurity stems from legal errors or omissions apparent on the face of the record in para 1.12 of the Supplementary Explanatory Memorandum.

From the standpoint of corporations and their advisers, it would be foolhardy to rely on the explanation and/or the example given in the Supplementary Explanatory Memorandum. The scope of the joint venture exceptions under ss 44ZZRO and 44ZZRP is a matter of law, not bureaucratic spin.

2.2.2 Practical implications for corporate compliance – the need for a 'flame arrester' procedure

Is the requirement of a contract workable given that an oral contract is sufficient for the joint venture exceptions under ss 44ZZRO and 44ZZRP?[18] The sufficiency of an oral contract ameliorates the burden of the requirement of a contract to some extent. However, in situations where cartel provisions arise from oral discussion of action to be taken to implement a joint venture, typically there will be no contract unless special steps are taken to create one. In such situations, the Supplementary Explanatory Memorandum concedes that the cartel provision will be a 'particular activity'[19] – a 'particular activity' is not the same as a *particular contract*.

Some corporations may try to protect themselves by amending their joint venture contracts to include provisions that deem any subsequent cartel provision in an arrangement or understanding for the purposes of the joint venture to be a cartel provision contained in the

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[18] House of Representatives, Explanatory Memorandum Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, para 4.32.

[19] Senate, Supplementary Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, para 1.12.

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joint venture contract. However, a provision of this kind would be an attempt to contract out of the TPA and ineffective.[20]

The only safe course open to corporations is that outlined in section 2.1 above, namely a standard 'flame arrester' operating procedure under which any discussion of non-compete, pricing and other specified sensitive topics is handled at a control point where any potential cartel provision is inserted routinely into a standard '44ZZRO/44ZZRP' contract as a contract variation. Such a solution is bureaucratic but is needed if corporations are to assure themselves of winning the lawmakers' silly contract game.[21] It is important to win this game: not to do so will expose corporations and individuals to criminal liability under ss 44ZZRF and 44ZZRG and civil penalties under ss 44ZZRJ and 44ZZRK.

The statement in the Supplementary Explanatory Memorandum that the 'compliance cost impact' is 'nil' is surely a misrepresentation.[22]

2.3 Pre-contractual joint venture arrangements or understandings

The contract proxy provisions in s 44ZZRO(1A)(1B) and s 44ZZRP(1A)(1B) do not make allowance for a non-contractual cartel provision contained in a pre-contractual joint venture arrangement or understanding even where that cartel provision is later incorporated in the joint venture contract contemplated by the parties.

Situations frequently arise where non-compete or other cartel provisions are discussed and agreed upon as a prelude to the formalisation of a joint venture in a joint venture contract. In some cases, the cartel provision will be in a binding MOU or an oral preliminary contract. In other cases, the parties will have taken care to make any arrangement or understanding conditional on the execution of a joint venture contract, and will have seen to the execution of a joint venture contract. However, cases will arise where intending joint venture parties enter into a commitment to a cartel provision without having a binding MOU and without making implementation of the cartel provision conditional on the execution of a joint venture contract. In such cases, the parties will not be able to rely on the contract proxy provisions even if the cartel provision is later incorporated in the joint venture contract they had in mind.

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[20] See *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546.

[21] Even if played online, this game is unlikely to be popular; see A Rollings & D Morris, *Game Architecture and Design* (2004).

[22] Senate, Supplementary Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, p 3. The statement in House of Representatives, Explanatory Memorandum Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, p 7, that the 'regulation impact on business' is 'low or no impact' is also a misrepresentation.

The relevant arrangement or understanding is the pre-contractual arrangement or understanding containing the cartel provision agreed by the parties. The parties did not intend *that* arrangement or understanding to be a contract - they intended that arrangement or understanding to be a pre-contractual arrangement or understanding. The contract proxy provisions in s 44ZZRO(1A)(1B) and s 44ZZRP(1A)(1B) therefore do not apply.

The Supplementary Explanatory Memorandum does not canvas the application or non-application of the contract proxy provisions in pre-contractual joint venture arrangements or understandings. No explanation has been given there or anywhere else why joint venture parties who enter into a pre-contractual arrangement or understanding containing a cartel provision should be exposed to criminal and civil liability where they act in good faith and with intent to incorporate the cartel provision in a joint venture contract. If the explanation is that the parties are expected to seek authorisation, the explanation lacks any sense of practicality.

It may be argued that it is up to corporations to make any pre-contractual joint venture arrangement or understanding containing a cartel provision conditional on the execution of a joint venture contract, and to make the condition explicit. If that precaution is taken, the only relevant contract, arrangement or understanding will be the joint venture contract. However, that argument is unpersuasive. First, preliminary joint venture discussions typically are conducted by entrepreneurs and business managers. No matter what compliance training is conducted beforehand, the legal trap presented by the requirement of a contract under ss 44ZZRO and 44ZZRP is most unlikely to be in their minds at the time. Secondly, the argument begs the questions of what evil is addressed by the requirement of a contract and whether it is necessary to impose such a requirement at all – see section 2.6 below.

2.4 Onerous requirement that each party have the requisite intention and reasonable belief

The contract proxy provisions in s 44ZZRO(1A)(1B) and s 44ZZRP(1A)(1B) require that *each party* to the arrangement or understanding intended the arrangement or understanding to be in a contract and reasonably believed that the arrangement or understanding was in a contract.[23]

This requirement precludes reliance on a joint venture exception by a defendant who had the requisite intention and reasonable belief but one other party did not. Liability should depend

[23] This paper does not discuss the questionable objective test of reasonable belief in the contract proxy provisions, at least in their application to criminal liability. Contrast the subjective test of knowledge or belief required as a fault element for the cartel offences.

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on the fault or otherwise of the *defendant*, not the fortuity of what other parties intended or believed or did not intend or believe. The effect of s 44ZZRO(1A)(1B) and s 44ZZRP(1A)(1B) is to impose a form of guilt by association. Guilt by association is inconsistent with the general principle of personal responsibility that is a valued tenet of our legal system.[24]

The requirement in question imposes an onerous evidentiary burden. A defendant seeking to rely on a joint venture exception under s 44ZZRO or s 44ZZRP will have to provide evidence about not only his or her own intention and belief, but also the intentions and beliefs of each and every other party to the relevant arrangement or understanding.

The rule that ignorance or mistake of law is no excuse[25] also creates a trap. A mistaken belief that a cartel is contained in a contract may easily stem from an error of law (eg, that an agreement to agree is a contract). Any such legally mistaken belief will rule out reliance on the contract proxy provisions in s 44ZZRO(1A)(1B) and s 44ZZRP(1A)(1B).

Given the problems indicated above, the ameliorating effect of the contract proxy provisions is very limited. No adequate attempt has been made by the Government to respond to the criticisms made of the undue strictness of the requirement under ss 44ZZRO and 44ZZRP that, to qualify for a joint venture exception, a cartel provision must be in a contract. Indeed, the Government has compounded the problems created by the requirement of a contract by setting additional traps for the unwary in s 44ZZRO(1A)(1B) and s 44ZZRP(1A)(1B).

2.5 Uncertainty about who must have requisite intention and reasonable belief where the party is a corporation

Where the party to an arrangement or understanding is a corporation, it is uncertain whose intention or belief is relevant when applying the contract proxy provisions under s 44ZZRO(1A)(1B) and s 44ZZRP(1A)(1B).[26]

Do the contract proxy provisions require:

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[24] Criminal responsibility is personal under the *Criminal Code* (Cth). See further G Williams, *Criminal Law: The General Part* (2nd ed, Stevens & Sons, 1961) ch 7.

[25] *Criminal Code* (Cth) s 9.3; *Ostrowski v Palmer* (2004) 218 CLR 493, [1]-[4] (Gleason CJ and Kirby J).

[26] Compare *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270 at 275-276 per Bray CJ ('very difficult questions' arise). On the difficulties of applying a corporate exception or defence where *exculpation* requires the corporation to hold a belief, see B Fisse, *Howard's Criminal Law* (5th ed, 1990, 615-616. Different and usually easier questions arise where knowledge or belief needs to be proven in order to *inculpate* a corporation; see eg *Krakowski v Eurolynx Properties Ltd* [1994] HCA 22; *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292.

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(a) an intention and reasonable belief on the part of any employee or agent of the corporation;

(b) an intention and reasonable belief on the part of all employees and agents of the corporation who are concerned in the arrangement or understanding;

(c) an intention and reasonable belief on the part of the employee or agent who is accountable within the organisation for securing compliance with ss 44ZZRO and 44ZZRP; or

(d) an intention and reasonable belief on the part of a someone who represents the 'directing mind and will' of the corporation? [27]

Considerable time and effort will need to be spent working out how s 44ZZRO(1A)(1B) and s 44ZZRP(1A)(1B) are to be interpreted. The Supplementary Explanatory Memorandum gives no clue.[28] On one possible view, the provisions are penal and ambiguous and the ambiguity should be resolved in favour of defendants by adopting interpretation (a).[29] Purposive interpretation is difficult because the rationale of the contract proxy provisions is to ameliorate the harshness of requiring a contract and the extent of amelioration intended is obscure and anyone's guess. Another difficulty is that a purposive interpretation along the lines of (c) is problematic: on that approach, selection of the relevant employee or agent whose intention and belief is to count seems to be governed more by the vagaries of internal allocation of compliance responsibilities within corporations than by the consistent application of an objective legal rule.

Nor is there any apparent amendment to s 84 that might easily resolve the difficulties. None of the possibilities outlined above commends itself as an obvious or satisfactory solution.

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[27] *Tesco Supermarkets Ltd v Nattrass* [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.

[28] See Senate, Supplementary Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, paras 1.14-1.25.

[29] See *Murphy v Farmer* (1988) 165 CLR 19; *Chew v The Queen* (1992) 7 ACSR 481; *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J); *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129, 145 (Mason, Deane and Dawson JJ); *Waugh v Kippen* (1986) 160 CLR 156, 164–5 (Gibbs CJ, Mason, Wilson and Dawson JJ); *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] FCA 826, [45]–[48].

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The problems discussed above are best avoided by removing the need for any requirement that a cartel provision be contained in a cartel contract and adopting a test that focuses on whether or not the cartel provision is ancillary to a pro-competitive joint venture. See section 2.6 below.

2.6 Inept legislative attempt to prevent sham joint ventures from evading the per se prohibitions against cartel conduct

The requirement for the joint venture exceptions under ss 44ZZRO and 44ZZRP that the cartel provision be contained in a contract is an inept method of trying to prevent the use of sham joint ventures as a way of evading the per se prohibitions against cartel conduct.

Clothing a joint venture in a contract is a paradigm method of disguising the sham nature of a joint venture.[30] This is apparent from the most insidious form of sham joint venture in modern commerce - the 'JV Ultra-Light.'[31] A JV Ultra-Light is a joint venture created on a contractual basis for the dominant purpose of evading a per se prohibition against cartel conduct and which is also calculated to achieve some efficiencies in order to create a substantial smokescreen.

It is unclear under s 44ZZRO (and corresponding provisions) whether or not a cartel provision in a JV Ultra-Light contract is 'for the purposes of a joint venture'. The relevant wording is not (and could not sensibly be): 'for the purposes of a joint venture and for no other purpose.' Nor is the wording: 'for the dominant purpose of pursuing efficiencies by means of a joint venture'. It seems sufficient that the provision is substantially for the purposes of a joint venture. If so, the cartel offences under s 44ZZRF and 44ZZRG and the civil prohibitions under s 44ZZRG and s 44ZZRK are vulnerable to evasion by the use of JV Ultra-Lights.[32]

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[30] See eg, *Timken Roller Bearing Co v US*, 341 US 593 (1951); *Arizona v Maricopa County Medical Society*, 457 US 332 (1982); *General Leaseways, Inc v National Truck Leasing Association*, 744 F 2d 588 (CA 7th Cir, 1984).

[31] Submission to Senate Standing Committee on Economics on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Parliament of Australia, 20 January 2009, Submission No 5, section 5.3.1 (B Fisse), available at: http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub05.pdf.

[32] There are of course possible backstops - the civil prohibitions against exclusionary provisions and anti-competitive agreements may apply. However, the existence of those backstops does not explain why JV Ultra-Lights should escape per se liability under ss 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK. See further B Fisse, 'Avoidance and Denial of Liability for Cartel Conduct: Proactive Lawful Escape Routes Left Open by the Cartel Legislation' 2009 Competition Law Conference, Sydney, 23 May 2009, section 3.4, at

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By contrast, s 45(4) of the *Competition Act 1985* (Can) (as amended in March 2009) addresses the JV Ultra-Light problem squarely by adopting a test of ancillary restraint derived from the well-developed ancillary restraint doctrine in US antitrust law.[33] Moreover, the defence of ancillary restraint under s 45(4) of the *Competition Act 1985* (Can) avoids the uncertainty of the wording 'for the purposes of a joint venture' in the TPA joint venture provisions.

The problem of JV Ultra-Lights and how that problem has been resolved in the USA and Canada have yet to be discussed in any Australian governmental discussion paper or report about the proposed cartel legislation.[34] An inarticulate assumption appears to be that the requirement of a contract for the joint venture exceptions under s 44ZZRO and s 44ZZRP is an appropriate and sufficient safeguard against the worst kinds of sham joint ventures. That assumption is unfounded.

2.7 The possibility of application for authorisation by the ACCC does not resolve the problems created by ss 44ZZRO and 44ZZRP

One possible response to the problems discussed above is to contend that those troubled by those problems can and should apply for an authorisation.[35]

Such a contention evades the key issues and is unpersuasive:

- Per se liability, especially criminal liability, warrants careful definition and should not extend to harmless or pro-competitive conduct. The authorisation process does not provide any justification for sweeping or careless definition of the elements of the cartel prohibitions or the exceptions that apply to them.

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http://www.brentfisse.com/images/Fisse_Avoidance_&_Denial_of_Liability_for_Cartel_Offences_230509.pdf

[33] See *US v Addyston Pipe & Steel Co* 85 Fed 271 at 282-283 (1898); RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1993) 26-30, 135-136, ch 13; G Werden, 'The Ancillary Restraints Doctrine after Dagher' (2007) 8 Sedona Conference J 17. The application of the amendments to s 45 of the *Competition Act 1985* (Can) are discussed in Canada Competition Bureau, *Competitor Collaboration Guidelines* (Draft May 2009).

[34] Treasury has never published any substantial discussion paper on any aspect of the cartel legislation and none of the few skimpy discussion papers it has published address any issues of joint venture exceptions. Contrast the useless jottings in Senate, Standing Committee on Economics, *Inquiry into the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008,* at paras 3.36-3.37, at http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/index.htm

[35] See eg, ACCC, Submission to the Senate Economics Committee Inquiry into the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, at http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_cartels_09/submissions/sub12.pdf, p. 7.

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- Authorisation typically is impractical given: (a) the need to establish public benefit; (b) the cost, delay, publicity and uncertainty of the process; and (c) the limited scope or period of immunity if authorisation is granted.

- Review of the authorisation process and possible ways of eliminating the need for authorisation is overdue. No equivalent process for regulating collaborations between competitors exists in the USA or the EC.[36]

- Authorisation is irrelevant to the problem of JV Ultra-Lights discussed in section 2.6 above.

3. CONCLUSION

The requirement of a contract, or a proxy for a contract, for a joint venture exception under ss 44ZZRO and 44ZZRP creates unnecessary traps for competitors who wish to collaborate in pro-competitive ventures. The traps, as discussed in sections 2.1 – 2.5 above, are difficult to avoid. Failure to avoid them will expose corporations and individuals unjustifiably to criminal and civil liability.

It is regrettable that the Government has seen fit to impose such ill-conceived provisions. A wide range of luckless victims – corporations, individuals, professional advisers, courts, enforcement agencies and ultimately consumer welfare - will suffer the consequences.

It is also regrettable that the Government has given highly misleading information about the application of the provisions – see Supplementary Explanatory Memorandum (para 1.12; example 4), as discussed in section 2.2.1 above. Those who rely on that misleading information can expect no comfort other than the shedding of crocodile tears by courts when making findings of liability and determining sentences, penalties and remedies.

[36] Advisory opinions are one alternative mechanism used in the USA; see eg FTC, TriState Health Partners, Inc. Advisory Opinion, April 13, 2009, at http://www.ftc.gov/os/closings/staff/090413tristateaoletter.pdf As regards the EC, see J Faull & A Nikpay, *The EC Law of Competition* (2nd ed 2007) 88-95.

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